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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RABBI ABRAHAM GROSSBAUM
and LUBAVITCH OF INDIANA, INC.,

Petitioners,

v.

INDIANAPOLIS-MARION COUNTY BUILDING AUTHORITY
and RONALD L. REINKING,
in his Capacity as General Manager,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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142 pp

QUESTION PRESENTED

Whether the First Amendment permits a government agency deliberately to exclude the speech of religious groups from a nonpublic forum by adopting a rule that is content-neutral on its face even if the motive for its adoption was to silence the particular viewpoint of the religious groups.

LIST OF PARTIES

The caption of this case contains the names of all parties to the proceeding in the court below.

Lubavitch of Indiana, Inc., has neither a parent company nor any nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED . . . . . (i)

LIST OF PARTIES . . . . . (ii)

TABLE OF AUTHORITIES . . . . . (v)

OPINIONS BELOW 2

JURISDICTION 2

RULE INVOLVED 2

STATEMENT 3

1. The Menorah Is Displayed for Eight Years 3

2. A Policy on Seasonal Displays Is Adopted 3

3. Petitioners Sue and Lose in the District Court 4

4. The Court of Appeals Grants Emergency Relief 4

5. Private Religious Displays Generate Controversy 5

6. Petitioners Win in the Court of Appeals 6

7. Petitioners' Apply for Chanukah 1995 7

8. Respondents Suddenly Amend Their Rule 7

9. Petitioners Promptly Amend Their Complaint 9

10. Petitioners Lose Again in the District Court 10

11. The Court of Appeals Affirms on Other Grounds 10

REASONS FOR GRANTING THE WRIT 11

I THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT 12

1. The *Cornelius* Decision 12

2. Earlier Decisions 13

3. The Flag-Burning Cases 14

4. A Recent Ruling 15

5. The Religion Cases 15

II THE DECISION BELOW CONFLICTS WITH RULINGS OF OTHER CIRCUITS . . . 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES:

City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 14

Cornelius v. NAACP Legal Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985) 11, 12, 13, 18

Daniel v. City of Tampa, 38 F.3d 546 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 2557 (1995) 18, 19

Edwards v. Aguillard, 482 U.S. 578 (1987) 15, 16

Grossbaum v. Indianapolis-Marion County Bldg. Auth., 63 F.3d 581 (7th Cir. 1995) 6

Grossbaum v. Indianapolis-Marion County Bldg. Auth., 870 F. Supp. 1450 (S.D. Ind. 1994) 4

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 6

Lemon v. Kurtzman, 403 U.S. 602 (1971) 15

Perry Educ. Ass'n v. Perry Local Educators Ass'n,
460 U.S. 37 (1983) 11, 13-14, 18

Searcey v. Harris,
888 F.2d 1314 (11th Cir. 1989) 16, 17, 19

Texas v. Johnson,
491 U.S. 397 (1989) 14

Texas v. Knights of the Ku Klux Klan,
58 F.3d 1075 (5th Cir. 1995) 18, 19

Turner Broad. Sys., Inc. v. FCC,
114 S. Ct. 2445 (1994) 15

United States v. Eichman,
496 U.S. 310 (1990) 14

Wallace v. Jaffree,
472 U.S. 38 (1985) 15, 16

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for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Rabbi Abraham Grossbaum and Lubavitch of Indiana, Inc., hereby request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, which affirmed the district court's denial of petitioners' motion for a preliminary injunction.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-25a, *infra*) is reported at 100 F.3d 1287. The opinion of the district court (Pet. App. B, pp. 26a-78a, *infra*), is reported at 907 F. Supp. 1187. An earlier opinion of the court of appeals (Pet. App. C., pp. 79a-113a, *infra*) is reported at 63 F.3d 581.

JURISDICTION

The opinion of the court of appeals was issued on November 20, 1996. On February 6, 1997, Justice Stevens granted petitioners' timely application for an extension of time to file a petition for writ of certiorari to and including March 18, 1997 (Pet. App. D, pp. 114a-115a, *infra*). This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

Amended Rule 13 of the Rules and Regulations Governing The Indianapolis-Marion County City-County Building and Grounds provides:

> No displays, signs or other structures shall be erected in the common areas by any non-governmental, private group or individual since such objects may interfere with unobstructed and safe ingress and egress by employees of the governmental tenants and by the general public conducting business with government offices and courts in the City-County Building.

STATEMENT

1. The Menorah Is Displayed for Eight Years.

The Indianapolis-Marion County City-County Building is the seat of government for Indiana's largest municipality. It houses (among other offices) the county courts, the police, and the Mayor's office. Access to the City-County Building for expressive activity is governed by the "Rules Governing The Indianapolis-Marion County City-County Building and Grounds," which are promulgated by the Indianapolis-Marion County Building Authority. The Building Authority's General Manager administers its Rules.

For each of eight years between 1985 and 1992, Rabbi Abraham Grossbaum, a religious leader affiliated with the Lubavitch Hasidic movement, and Lubavitch of Indiana, Inc., obtained permission from the Building Authority's General Manager, Ronald L. Reinking, to display a five-foot high, wooden menorah in the lobby of the City-County Building. In February 1993, however, the Indiana Civil Liberties Union ("ICLU") and the Jewish Community Relations Council ("JCRC") challenged the display of religious symbols — the menorah, in particular — on government property. In correspondence to Mr. Reinking, the organizations demanded that the Authority totally prohibit religious displays in the Building.

2. A Policy on Seasonal Displays Is Adopted.

In October 1993, in response to the "controversy" engendered by the ICLU and JCRC correspondence, the Directors of the Building Authority, at Mr. Reinking's urging, unanimously approved a regulation declaring that "religious displays" would not be permitted in the City-

County Building because "the display of seasonal religious symbols in the halls of government conveys the appearance of governmental endorsement of religion in violation of the Establishment Clause of the First Amendment of the Federal Constitution." As a result of this new Policy on Seasonal Displays, Mr. Reinking advised Rabbi Grossbaum that the menorah could not be displayed during Chanukah 1993.

3. Petitioners Sue and Lose in the District Court.

On November 7, 1994, the petitioners (collectively "Lubavitch") instituted an action in the United States District Court for the Southern District of Indiana challenging the constitutionality of the Policy on Seasonal Displays. Lubavitch moved for a preliminary injunction on Count I of its complaint, which alleged that the Building Authority's Policy on Seasonal Displays constituted impermissible viewpoint-based discrimination against religious speech.

In a joint factual stipulation it was agreed that, for the purposes of Lubavitch's motion for a preliminary injunction, the lobby of the City-County Building is to be considered a "nonpublic forum." After a hearing, the district court denied the request for a preliminary injunction. The court said that it was "not persuaded the Building Authority has taken any actions that amount to recognizing 'the holiday season' as a meaningful category or subject matter for speech and expression of competing 'viewpoints' in this nonpublic forum." *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 870 F. Supp. 1450, 1461 (S.D. Ind. 1994).

4. The Court of Appeals Grants Emergency Relief.

Lubavitch immediately appealed and requested emergency relief from the Seventh Circuit. Two days after

Chanukah began, the court of appeals stayed the district court's decision and enjoined enforcement of the Policy on Seasonal Displays pending full appellate review.

5. Private Religious Displays Generate Controversy.

Because of the Seventh Circuit's injunction, the Building Authority granted permission for the menorah and for three other private religious displays to be placed in the lobby. The other displays were a cross that was erected for six days, a poster bearing the scriptural passage "Thou Shalt Have No Other Gods, Nor Display Their Images" that was erected for either five or six days, and a cardboard sign of a "pentacle" (a five-pointed star inside a circle) that was erected for less than one day before it was stolen. A Christmas tree was also displayed in the lobby. Other than the theft of the pentacle, there were no demonstrations, violence, disturbances, safety hazards, or security-related incidents caused by any of these displays. Nor has there ever been any demonstration, violence, disturbance, safety hazard, or security-related incident of any kind as a result of any private display in the City-County Building.

The religious displays did, however, generate discussion. According to the Building Authority's General Manager, some passersby seeing the "pentacle" sign made "comments that it did not belong there," and the cross display also reportedly generated "comments [that] were basically negative about having such displays." Rabbi Grossbaum's ceremony for children, held in connection with the menorah display, also reportedly generated some "hostile commentary." The thrust of all the comments was that "these type of displays should not be permitted or were not appropriate for the building."

While the appeal was pending, the Building Authority instituted new security measures on the ground floor of the City-County Building — the floor below the lobby — and also continued long-standing discussions regarding security for the first floor of the Building. In June, the City-County Council authorized the purchase of a single metal detector to be placed in one wing of the first floor, approximately 60 to 80 feet away from where the menorah and other displays are placed. At no time during the many years in which these security measures were under consideration did anyone propose that the Building Authority ban private displays to enhance security in, or access to, the City-County Building.

6. Petitioners Win in the Court of Appeals.

On August 15, 1995, after full briefing and argument, the Seventh Circuit reversed the district court. Relying heavily on *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), the court of appeals held that the Building Authority's Policy on Seasonal Displays, which "prohibit[ed] [] the menorah's message because of its religious perspective," constituted viewpoint-based discrimination forbidden by the First Amendment. *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 63 F.3d 581, 592 (7th Cir. 1995) (Pet. App. C, p. 103a, *infra*). The court of appeals said, "[T]he district court erred by not acknowledging the right of the plaintiffs to exercise their rights of free expression in the nonpublic forum created by the Building Authority on the same terms as all other persons, regardless of the religious or non-religious nature of their message." 63 F.3d at 595-96 (p. 113a, *infra*).

7. Petitioners Apply for Chanukah 1995.

Less than two weeks after the court of appeals ruling, Rabbi Grossbaum wrote to Mr. Reinking requesting permission to display the menorah in the City-County Building during Chanukah 1995. Rabbi Grossbaum received no written or oral response to his request for several months. The sponsor of the scriptural poster display, who again requested permission to display his poster during the holidays, was promptly informed by Mr. Reinking that his request could not be granted while the Building Authority considered its "complex options."

8. Respondents Suddenly Amend Their Rule.

At the September 1995 meeting of the Building Authority, the Directors discussed the menorah litigation with Lubavitch and the possibility of settlement. They then considered the lobby display rules. The minutes of the September meeting read, in pertinent part:

> The Board of Directors also discussed with counsel Rules 13 and 14 of the Rules and Regulations governing the City-County Building. . . . Rule 13 bans non-governmental, private groups from erecting displays and structures in the common areas. Rule 14 prohibits the use of the common areas of the City-County Building for political activities and the display of political signs. It was observed that these original rules reflect the purpose served by the lobbies and corridors to provide unobstructed and safe ingress and egress to City and County

> government offices by employees and by the general public conducting business in the City-County Building. In this regard, the Board of Directors briefly discussed the effects that the new security measures at the City-County Building will have on pedestrian traffic in the common areas.

The minutes reflect no instruction or request given by the Board to Mr. Reinking or to the Authority's counsel to promulgate any new regulation. Nor is there any evidence in the record that any such instruction or request was made orally.

The General Manager's briefing memorandum and agenda for the October 1995 Building Authority Board meeting disclosed no proposal to amend Rules 13 and 14. Yet when the Board met at 10:00 a.m. on October 2nd — immediately after an hour-long "Executive Session" at which only the Lubavitch litigation was addressed behind closed doors in a confidential meeting — the Board promptly voted unanimously to amend the Rules to ban all displays in the lobby of the City-County Building. The language of Rule 13 relevant to this case was amended to prohibit private displays in the lobby. *See* p. 2, *supra*.

Although the language of the Rule refers to safety and access concerns caused by private displays, the minutes indicate that the Board's legal counsel focused his remarks specifically on the concern with "certain private displays":

> Certain private displays and structures can create controversy, disruption, and

> hostility. This causes a concern for security, public safety and pedestrian control in the lobby and the corridors. In one instance, a private display caused sufficient hostility that it was stolen within one hour after its erection.

General Manager Reinking, who was present during this meeting, testified that the reference in the minutes to "certain displays" that created controversy meant "the menorah, the pentacle for the hour that it was there, the cross and [the scriptural] poster display." Other members of the Building Authority Board confirmed, in their depositions, that they intended in amending Rule 13 to continue the ban on religious displays in the lobby of the City-County Building.

9. <u>Petitioners Promptly Amend Their Complaint</u>.

On the following day, Mr. Reinking sent a letter to Rabbi Grossbaum refusing his request to display his menorah in the City-County Building lobby for 1995, citing Rule 13 (although Mr. Reinking did not tell Rabbi Grossbaum that Rule 13 had been amended on the preceding day).

After learning of the sudden surreptitious amendment to Rule 13, Lubavitch conducted expedited document and oral discovery. On November 29, 1995, petitioners filed an amended complaint which alleged that the "safety" and access reasons stated in the Board's minutes for the amendments to the display rules were "pretextual," and that the true reason for adopting a new Rule was to suppress Lubavitch's rights of free speech and free exercise of

religion, to deny Lubavitch equal protection of the laws, and to retaliate against Lubavitch for having initiated a lawsuit. Lubavitch also moved for a preliminary injunction in order to be able to display the menorah in Chanukah 1995.

10. Petitioners Lose Again in the District Court.

The district judge held a hearing on Lubavitch's second motion for a preliminary injunction shortly before Chanukah. He found that the petitioners had failed to prove that the Authority had an unconstitutional motive in amending Rule 13. The district judge accepted the Authority's stated explanation for the timing of the amendment to Rule 13, for the secretive manner of its adoption, and for the form and reach of the new Rule (Pet. App. B, pp. 26a-78a, *infra*). Accordingly, the district court denied the requested injunction.

11. The Court of Appeals Affirms on Other Grounds.

Lubavitch appealed once again. The court of appeals (per Kanne, J.) affirmed the district court, but on different grounds (Pet. App. A, pp. 1a-25a, *infra*). It held "that the motive of a government body is irrelevant when it enacts a content-neutral rule that regulates speech in a nonpublic forum" (p. 2a, *infra*). Because the court found amended Rule 13 to be a content-neutral restriction on speech, it barred an inquiry into governmental motive, and held that Lubavitch's evidence that the Building Authority was, in fact, motivated by an intent to silence religious speech was constitutionally irrelevant (pp. 23a-24a, *infra*). Accordingly, the Seventh Circuit affirmed the district court's decision to deny Lubavitch preliminary injunctive relief.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit assumed *arguendo* in this case that the respondents — a government body that controls access to a public building and its general manager — deliberately sought to suppress the speech of the petitioners — a religious group seeking to display the respected and time-honored religious symbol of Judaism's winter holiday. The court also assumed, *arguendo*, that the respondents intended to retaliate against the petitioners because the petitioners had succeeded in obtaining judicial vindication of their right of free expression.

The court below permitted the suppression of speech expressing a minority viewpoint and it acquiesced in a retaliatory measure aimed pointedly at the petitioners only because the respondents cloaked their suppression of a particular viewpoint with a "content-neutral rule." The court of appeals' opinion acknowledged that this constitutional doctrine conflicts with decisions of this Court in cases involving legislative motive such as *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985), and *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983). Nonetheless, the court below held that language in "more recent cases" of this Court "suggest a more objective measure of viewpoint-neutrality" than the actual holdings of *Perry* and *Cornelius*. See Pet. App. A, p. 20a, *infra*.

The novel and revolutionary decision of the Seventh Circuit rejecting the relevance of governmental motivation in determining the constitutionality of official regulation has very broad ramifications. It can affect the exercise of constitutional rights not only under the First Amendment, but also under the Fourth, Fifth, Sixth, Fourteenth and Fifteenth Amendments. In each of these important constitutional

areas, governmental agencies are free — if the Seventh Circuit is correct — to deny constitutional liberties so long as the means used is, on its face, "content-neutral."

Despite the difficulties of divining legislative motive, courts have — where necessary — heretofore recognized that a government agency may not act with a discriminatory motive to prevent a particular group from exercising a constitutional right. This is true even if the government agency succeeds in masking its discriminatory purpose behind a general regulation. This Court and the lower federal courts have been on guard to protect unpopular and weak minorities from sophisticated, as well as crude, forms of discrimination.

The constitutional doctrine articulated and applied by the Seventh Circuit in this case clears the way for invidious discrimination that is cleverly concealed. The rule applied by the court below bars inquiries that this Court has repeatedly held to be constitutionally appropriate.

I

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

(1) **The *Cornelius* Decision.** — The Seventh Circuit acknowledged that the broad constitutional doctrine applied by it in this case — *i.e.*, that legislative motive is irrelevant and may not be the subject of inquiry — is inconsistent with this Court's ruling in *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985). In the *Cornelius* case, Justice O'Connor's opinion for the Court noted that the plaintiffs had claimed that they were excluded from a nonpublic forum "in an attempt to suppress their points of view." 473 U.S. at 811. The government agency, in

response, argued in *Cornelius* that its policy was viewpoint-neutral. 473 U.S. at 811-812.

This Court held that "an exclusion that is in fact based on the desire to suppress a particular point of view" would be constitutionally impermissible. It remanded the case for a decision by the lower courts as to "whether the Government excluded respondents because it disagreed with their viewpoints." 473 U.S. at 812. Indeed, Justice Stevens' dissenting opinion in *Cornelius* said (473 U.S. at 833):

> Everyone on the Court agrees that the exclusion of "advocacy" groups from the Combined Federal Campaign (CFC) is prohibited by the First Amendment if it is motivated by a bias against the views of the excluded groups.

In this case, as in *Cornelius*, the plaintiffs maintain that the "purported concern" of the government agency "may conceal a bias against the viewpoint advanced by the excluded speakers." 473 U.S. at 812 (O'Connor, J., for the Court). If not for the novel doctrine applied by the Seventh Circuit, that contention could be fully heard in the courts below. But the Seventh Circuit has barred such an inquiry even though it appears to be within the principles that Justice Stevens said had been accepted by "[e]veryone on the Court" at the time of *Cornelius*.

(2) Earlier Decisions. — The rule applied in *Cornelius* had been approved by the Court in the nonpublic-forum context in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (emphasis added): "In addition to time, place, and manner regulations, the State

may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable *and not an effort to suppress expression merely because public officials oppose the speaker's view.*"

In *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984), this Court emphasized that "there are some purported interests — such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas — that are so plainly illegitimate that they would immediately invalidate the rule."

(3) **The Flag-Burning Cases.** — The flag-burning cases decided by this Court also conflict with the Seventh Circuit's novel doctrine. In *Texas v. Johnson*, 491 U.S. 397 (1989), this Court considered a state statute that criminalized desecration of the United States flag through acts that "the actor knows will seriously offend" onlookers. The Court found this to be a content-based regulation of speech that was impermissible under the First Amendment. Congress then enacted a second law which sought to prohibit flag-burning. Unlike the first statute, this law made no reference to the onlooker's reaction to the speech. It was content-neutral on its face. This Court had no difficulty in concluding that, for the same reasons as the first statute, the second law was also constitutionally invalid: "Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is 'related "to the suppression of free expression."'" *United States v. Eichman*, 496 U.S. 310, 315 (1990) (emphasis added). The "enduring lesson" of this Court's First Amendment decisions, described in *Texas v. Johnson*, 491 U.S. 397, 416 (1989), was that "the government may not

prohibit expression simply because it disagrees with its message."

(4) A Recent Ruling. — This Court also explained in *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2461 (1994):

> Our cases have recognized that even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys.

Reviewing the detailed legislative history behind the regulation challenged in *Turner*, this Court was persuaded "that Congress' overriding objective in enacting must-carry [rules] was not to favor programming of a particular subject matter, viewpoint, or format," but rather to preserve access to free television programming for Americans without cable. *Id.* On this basis, the statute was upheld. But it is clear from the *Turner* opinion that if there had been evidence of a Congressional desire to benefit particular viewpoints, the law would have been invalidated notwithstanding its facial neutrality.

(5) The Religion Cases. — Finally, it is clear that impermissible government motivation may render a law unconstitutional under the Establishment Clause of the First Amendment. The first of the three constitutional criteria by which governmental action is measured under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is whether it has a "secular purpose." This Court has invalidated laws precisely because it determined that the legislative purpose was not truly secular. *E.g.*, *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985). If a government's

religious "purpose" is sufficient to disable a state statute that otherwise appears to be content-neutral, such as the laws involved in *Edwards v. Aguillard* and *Wallace v. Jaffree*, why should the governmental "purpose" to suppress particular unpopular speech not suffice to invalidate a seemingly content-neutral regulation that limits those who may speak in a governmentally controlled nonpublic forum?

A regulation that appears to be content-neutral may, in truth, be directed at particular expression that is opposed by the public officials who are in power at a given time. The decision of the Seventh Circuit prevents any judicial inquiry beneath the surface of such a regulation. That should not become the governing constitutional doctrine in a large part of the country, notwithstanding this Court's many rulings to the contrary, unless it has been given prior consideration and review by this Court.

II

THE DECISION BELOW CONFLICTS WITH RULINGS OF OTHER CIRCUITS

The novel constitutional rule announced by the Seventh Circuit in this case — namely, that evidence of discriminatory animus is constitutionally irrelevant when content-neutral restrictions on speech are imposed in a nonpublic forum — conflicts with a recent decision of the Eleventh Circuit and with the reasoning of the Fifth Circuit in a recent case. This conflict in interpretation of the Constitution's First Amendment should be resolved by this Court.

In *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989), the Atlanta Peace Alliance ("APA") challenged its

exclusion from Youth Motivation Day and Career Day in Atlanta's public schools. The APA was excluded from these events because of the Atlanta School Board's content-neutral administrative regulations.

Applying this Court's precedents governing speech restrictions in nonpublic forums (888 F.2d at 1318), the Eleventh Circuit looked to whether the Atlanta School Board intended to discriminate against the APA's viewpoint when it enacted and applied its Career Day regulations. The court described the test as follows (888 F.2d at 1319 (emphasis added)):

> [T]he Board's Career Days policy and regulations will be upheld if they are reasonable in light of the purposes of the forum *and were not promulgated to suppress the viewpoint of the APA.*

The court of appeals then said that "the facts surrounding the adoption of the regulations support the inference that the regulation was written to specifically exclude the APA from Career Day . . . [and] was intended to suppress the APA's viewpoint." 888 F.2d at 1322; *see also id.* at 1325 ("[t]he district court found that the Board was motivated by its disagreement with the APA's views"). The Eleventh Circuit considered the "procedure by which the policy was adopted," which it said "is an important factor in deciding whether the Board engaged in viewpoint discrimination." It specifically cited the Board's desire to "avoid[] debate about controversial matters" and "doubts as to the genuineness of the Board's justifications" for the regulation as "support[] [for] an inference that the Board intended to suppress the APA's views." *Id.*

In *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 2557 (1995) the Eleventh Circuit again employed the same analysis in an appeal challenging the application of Tampa's trespassing statute to a leafleteer in a public housing project. After determining that the housing project is a nonpublic forum and the trespassing law itself is content-neutral, the court turned aside the plaintiff's challenge, holding that "[t]here is simply no evidence that the police arrested Daniel because they disagreed with his message." 38 F.3d at 550.

The Fifth Circuit employed the identical test in a recent case challenging the exclusion of the Ku Klux Klan from the Texas "adopt-a-highway" program. In *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995), the Klan appealed the State's denial of permission for the Klan to "adopt" a two-mile stretch of highway near a Vidor, Texas, housing project that was under a desegregation order strongly opposed by the Klan. Analyzing the program as a nonpublic forum, the court applied the test articulated by this Court in *Perry* and *Cornelius*.

The Fifth Circuit found that refusing the Klan permission to adopt a section of highway near the Vidor housing project was a reasonable effort to avoid strife and promote compliance with the desegregation order. 58 F.3d at 1079-80, 1081. On viewpoint neutrality, the court observed that "[t]he existence of reasonable grounds for preventing access to a nonpublic forum will not justify a State's restriction of speech that is actually 'an effort to suppress expression merely because public officials oppose the speaker's view.'" 58 F.3d at 1080 (quoting *Perry*). Surveying the record, the court found "no indication . . . that the State's attempt to prevent the Klan from adopting a section of highway outside Vidor is *actually motivated* by a

desire to suppress the Klan's view." *Id.* at 1080-81 (emphasis added).

The reasoning of the Seventh Circuit in this case is inconsistent with the Eleventh Circuit's holding in *Searcey* and with the reasoning of *Daniel* and *Knights of the KKK*. In this case, the court refused to consider petitioners' evidence that the Building Authority was, in fact, motivated in amending Rule 13 by a desire to silence petitioners' speech, and that its facially neutral regulation was merely a facade for that discrimination. Had this case arisen in either the Eleventh or Fifth Circuits, petitioners could have prevailed with their evidence of illicit legislative intent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 1997

APPENDIX

Appendix A

In the
United States Court of Appeals
For the Seventh Circuit

No. 95-3976

RABBI ABRAHAM GROSSBAUM and LUBAVITCH OF INDIANA, INC.,

Plaintiffs-Appellants,

v.

INDIANAPOLIS-MARION COUNTY BUILDING AUTHORITY and RONALD L. REINKING, in his Capacity as General Manager,

Defendants-Appellees.

Appeal from the Untied States District Court
for the Southern District of Indiana,
Indianapolis Division.
No. 94 C 1801—**David F. Hamilton**, *Judge*.

ARGUED SEPTEMBER 6, 1996—DECIDED NOVEMBER 20, 1996

Before CUMMINGS, BAUER, and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. This case presents the issue of what role a government body's motive plays in constitutional analysis when that body tries to regulate speech in a nonpublic forum. The Indianapolis-Marion County Building

Authority amended its rules and regulations to prohibit private groups and individuals from exhibiting displays in the lobby of its City-County Building. This rule prevented the plaintiffs from displaying a menorah in the lobby as they had done for eight years between 1985 and 1992. The plaintiffs sought a preliminary injunction against the new rule so they could again display their menorah. The plaintiffs contended that even though the rule is viewpoint-neutral, its adoption was motivated by an unconstitutional desire to retaliate against the plaintiffs for previous litigation and to discriminate against their religious viewpoint. The District Court denied the motion for the preliminary injunction. Because we hold that the motive of a government body is irrelevant when it enacts a content-neutral rule that regulates speech in a nonpublic forum, we affirm.

I. HISTORY

This is the second time that this case has come before us. *See Grossbaum v. Indianapolis-Marion County Building Authority*, 63 F.3d 581 (7th Cir. 1995)(Grossbaum I). In the previous appeal, Rabbi Grossbaum and Lubavitch of Indiana, Inc., [1] ("Lubavitch") successfully challenged a policy of the Indiana-polis-Marion County Building Authority ("Building Authority") that prohibited *religious* displays and symbols (such as the plaintiffs' menorah) in the lobby of the

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[1] Lubavitch is "an organization of Hasidic Jews who follow the teachings of a particular Jewish leader, the Lubavitch Rebbe. The Lubavitch movement is a branch of Hasidism, which itself is a branch of orthodox Judaism." *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 587 n.35 (1989) (citations omitted).

City-County Building [2] in Indianapolis. We held that "the prohibition of the menorah's message because of its religious perspective was unconstitutional under the First Amendment's Free Speech Clause." *Grossbaum I*, 63 F.3d at 592. This second appeal now challenges a new Building Authority policy that prohibits *all* private displays, religious or otherwise.

From 1985 to 1992, Rabbi Grossbaum displayed a five-foot high, wooden menorah each year in the City-County Building lobby. In 1993, however, the Indiana Civil Liberties Union ("ICLU") and the Jewish Community Relations Council ("JCRC") both asked the Building Authority to change its policy. The ICLU argued that religious displays in a nonpublic forum violated the Establishment Clause and that the Building Authority should therefore designate the lobby as a "public forum" to make it clear that all groups would have access to the lobby. The JCRC, meanwhile, wrote a letter to the Building Authority asking that all religious displays be banned so that groups such as the Ku Klux Klan could not use the menorah's presence as an argument for letting in their religious displays.

Expressing concern about losing control over the lobby if it became a public forum, the Building Authority Board of Directors in late 1993 banned all religious displays, thus simultaneously satisfying the JCRC and mooting the ICLU's Establishment Clause complaint. Lubavitch, however, sought a preliminary injunction against the policy, alleging that it was an unconstitutional exclusion of speech

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[2] The City-Council Building in downtown Indianapolis is the seat of government for the City of Indianapolis and the County of Marion, Indiana. The defendant Building Authority is a municipal corporation that administers the building.

protected by the First Amendment. As mentioned above, this court agreed and granted Lubavitch injunctive relief. 63 F.3d at 582.

After our August 1995 decision, however, the Building Authority Board again modified its lobby display policy. At its October 2, 1995 meeting, the Board amended Rule 13 of its "Rules and Regulations Governing The City-County Building and Grounds" to read, in part:

> No displays, signs or other structures shall be erected in the common areas by any non-governmental, private group or individual since such objects may interfere with unobstructed and safe ingress and egress by employees of the governmental tenants and by the general public conducting business with government offices and courts in the City-County Building.

On November 29, 1995, Lubavitch amended its original complaint and again sought a preliminary injunction to allow the display of its menorah. Although Rule 13 is content-neutral, Lubavitch claimed that the Board enacted the new rule with an unconstitutional intent. More specifically, Lubavitch alleged two counts under 42 U.S.C. § 1983: 1) that the Board intended to retaliate against Lubavitch for exercising its right to seek judicial relief and its right to speak in the City-County Building lobby, and 2) that the Board intended to perpetuate the viewpoint discrimination that the Board had earlier attempted when it banned all religious displays in the lobby.

Lubavitch offered three general categories of evidence to support its claims of unconstitutional motive. First, Lubavitch claimed that the Building Authority enacted Rule

13 in a surreptitious manner. Rule 13 was adopted less than two months after this court's decision in favor of Lubavitch, and the only public notice that the Board might change Rule 13 at its October 1995 meeting was a vague agenda item referring to "Policies on Use of Common Areas." The Building Authority responded, however, that it had at all times followed Indiana's Open Door Law procedures. Second, Lubavitch disputed the Board's justification for the new Rule 13. According to the Board's minutes, the Board banned private displays to assure the free flow of pedestrian traffic in the lobby. The minutes also state that lobby congestion was a particular concern of the Board after it had approved new security measures (such as metal detectors in the lobby) in June 1995. Lubavitch, however, argued that there was no history of displays disrupting lobby traffic that would justify banning all private displays. Third, Lubavitch cited deposition testimony by Board members that it was the Board's intent to ban religious displays. The Building Authority countered that the testimony was taken out of context in that the admission of a desire to ban religious displays was merely a logical implication of the Board's broader desire to ban all private displays.

The District Court denied Lubavitch's motion for a preliminary injunction, finding that the plaintiffs had not shown a reasonable likelihood of prevailing on either their retaliation or their viewpoint discrimination claim. 909 F. Supp. 1187, 1211 (S.D. Ind. 1995). The court held that although the new Rule 13 was a *response* to Lubavitch's prior litigation, the rule "remedied the constitutional violation and was not motivated by any desire to punish plaintiffs or to get even with them for filing suit." *Id.* Similarly, the court found that the Board's decision was not "a mask for a desire to prohibit the expression of these plaintiffs' or others' religious beliefs." *Id.* Because the balance of harms to the parties was not lopsided, the District

Court therefore denied the preliminary injunction. Lubavitch appealed pursuant to 28 U.S.C. § 1292(a)(1), which gives us jurisdiction to review interlocutory orders that deny injunctive relief.

II. ANALYSIS

A. *Standard of Review*

In considering a motion for a preliminary injunction, a district court must first determine whether the moving party has demonstrated 1) some likelihood of prevailing on the merits, and 2) an inadequate remedy at law and irreparable harm if preliminary relief is denied. If the movant demonstrates both, the court must then consider 3) the irreparable harm the nonmovant will suffer if preliminary relief is granted, balanced against the irreparable harm to the movant if relief is denied; and 4) the public interest, meaning the effect that granting or denying the injunction will have on nonparties. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1067 (7th Cir. 1994).

When we review a trial court's grant or denial of a preliminary injunction, we subject findings of fact to clear error review, Fed. R. Civ. P. 52(a); we review a trial court's discretionary balancing of factors under an abuse of discretion standard, *Gould v. Lambert Excavating, Inc.*, 870 F.2d 1214, 1217 (7th Cir. 1989); and we review a trial court's legal conclusions *de novo*, *West Allis Memorial Hosp., Inc. v. Bowen*, 852 F.2d 251 (7th Cir. 1988).

B. *The Role of Motive in Constitutional Doctrine*

Before addressing Lubavitch's specific claims of retaliation and viewpoint discrimination, a few words are appropriate to consider exactly when and why the motives of

government actors are relevant in constitutional analysis. Both parties in this case seem to assume that if the Building Authority Board was motivated by an intent to retaliate against Lubavitch or to discriminate against religious viewpoints then *ipso facto* the Board violated the

Constitution. This leap from nefarious motive to constitutional violation, however, is by no means an automatic one under constitutional case law.

Motive is, of course, relevant to a number of constitutional claims. In Equal Protection Clause analysis, for example, courts often must inquire into the motives of legislators or other government actors. [3/] *See, e.g., Miller*

[3/] Although courts are often loose in their phraseology, the inquiry that courts *occasionally* make into the subjective "intent," "motive," or "actual purpose" of government actors should not be confused with the inquiry courts *always* must make in Equal Protection Clause cases to determine whether a classification advances any legitimate government "purpose," "interest," or "end". The former inquiry requires courts to examine whether the actual thoughts of government officials were constitutionally pure. In Justice Cardozo's words, it requires judges to "psychoanalyze" legislators. *See United States v. Constantine*, 296 U.S. 287, 299 (1935) (Cardozo, J., dissenting). The latter inquiry, however, requires courts to consider only whether "any state of facts reasonably may be conceived to justify" the classification. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *see also* Alexander M. Bickel, *The Least Dangerous Branch* 209 (1962) ("[A] determination of 'purpose' ... is either the name given to the Court's objective assessment of the effect of a statute or a conclusionary term denoting the Court's independent judgment of the constitutionally allowable end that the legislature could have had in view.").

The subjective motivations of government actors should also not be confused with what the Supreme Court recently referred to, in

v. Johnson, 115 S. Ct. 2475, 2488 (1995) (voting district violates Constitution if race was "the predominant factor motivating the legislature's decision to place a significant number of voters within or without" the district); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (prosecutor's peremptory challenges are unconstitutional if based solely on purposeful racial discrimination). Similarly, cases under the Establishment Clause or the Bill of Attainder Clauses [4/] may require courts to query the subjective intentions of legislators for possible illicit motives. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (legislature's "actual purpose" to promote religion invalidates statute); *United States v. Lovett*, 328 U.S. 303, 313-14 (1946) (circumstances of bill's passage showed that its purpose was to punish particular individuals).

The relevance of motive in these instances of constitutional adjudication does not, however, allow the inductive conclusion that a universal, all-purpose cause of action exists whenever a plaintiff can allege an unconstitutional motive. In a Free Speech Clause case, for example, the Supreme Court went so far as to say that "it is

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a Free Exercise Clause case, as the "object" of a law. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 533 113 S. Ct. 2217, 2227 (1993). The Court there determined that three ordinances impermissibly "had as their object the suppression of religion." *Id.* at 2231. The Court made this determination by analyzing both the text and the effect in "real operation" of the ordinances. *Id.* at 2226-31. The Court did not, however, analyze the motive behind the ordinances. Justice Kennedy's investigation into motive (in Part IIA-2 of his opinion) was joined by only Justice Stevens.

[4/] Article I, § 9, cl. 3 of the U.S. Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed." Article I, § 10, cl. 1 provides: "No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts...."

a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Although that statement may be hyperbole, one constitutional commentator has concluded that, rather than focusing on motive, "most descriptive analyses of First Amendment law, as well as most normative discussions ... have considered the permissibility of governmental regulation of speech by focusing on the effects of a given regulation." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 413 (1996); *cf. McCray v. United States*, 195 U.S. 27, 56 78 (1904) ("The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.").

Even in the Equal Protection Clause context, the Supreme Court has occasionally been reluctant to question legislative and administrative motive. In *Palmer v. Thompson*, 403 U.S. 217 (1971), the City of Jackson, Mississippi had decided to close its public swimming pools rather than desegregate them under court order. The Supreme Court, faced with facts obviously analogous to the case we now consider, explicitly declined to inquire into the city council's motives for closing the pools. *Id.* at 224-26. The Court upheld the closings because the petitioners had shown "no state action affecting blacks differently from whites." *Id.* at 225.

A number of factors explain this reluctance to probe the motives of legislators and administrators. For starters, the text of the Constitution prohibits many government actions but makes no mention of governmental *mentes reae*

(*i.e.*, guilty minds). The First Amendment, for example, forbids Congress and (through the Fourteenth Amendment's Due Process Clause) the States from making laws "abridging the freedom of speech" — a far different proposition than prohibiting the intent to abridge such freedom. "We are governed by laws, not by the intentions of legislators." *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1567 (1993) (Scalia, J., concurring in judgment). Just as we would never uphold a law with unconstitutional effect because its enactors were benignly motivated, an illicit intent behind an otherwise valid government action indicates nothing more than a failed attempt to violate the Constitution. *See Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2240 (1993) (Scalia, J., concurring in part and concurring in judgment); *see also* Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 Sup. Ct. Rev. 1, 23.

Beyond these theoretical objections to investigating motive, practical considerations also suggest caution. Government actions may be taken for a multiplicity of reasons, and any number of people may be involved in authorizing the action. Doubting the propriety of judicial searches for corrupt motives, Chief Justice Marshall thus asked:

> Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810). Moreover, once a court finds an illicit motive, may the

legislature or administrative body ever take the same action again without the imputation of improper intent? The Court in *O'Brien* declined to strike down a law allegedly tainted by improper motive in part because Congress could then reenact the law "in its exact form if the same or another legislator made a 'wiser' speech about it." 391 U.S. at 384; *see generally* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1212-17 (1970).

In short, the relevance of motive to constitutional adjudication varies by context. No automatic cause of action exists whenever allegations of unconstitutional intent can be made, but courts will investigate motive when precedent, text, and prudential considerations suggest it necessary in order to give full effect to the constitutional provision at issue.

C. *Lubavitch's Retaliation Claim*

Turning now to the plaintiffs' specific claims, Lubavitch first alleges that the Building Authority's adoption of Rule 13 was in retaliation for plaintiffs' exercise of their free speech rights and for their exercise of their right to petition the courts for redress of grievances. Lubavitch undoubtedly has such rights. [5/] Whether Lubavitch also

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[5/] Lubavitch presumably is referring to its rights under the Free Speech Clause and the Petition Clause. The Petition Clause of the First Amendment prohibits Congress from making any law "abridging ... the right of the people ... to petition the Government for a redress of grievances." The Supreme Court has held that this right to petition includes the right of access to the courts. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The Court has also held that both the Free Speech Clause and the Petition Clause apply to the States through the Fourteenth Amendment's Due Process Clause. *See Gitlow v. New York*, 268

has a legitimate cause of action for retaliation, however, is another matter.

The plaintiffs cite numerous cases for the general proposition that "an act in retaliation for the exercise of a constitutionally protected right is actionable under Section 1983 even if the act, when taken for different reasons, would have been proper." *Howland v. Kilquist*, 833 F.2d 639, 644 (7th Cir. 1987). Indeed, there seems to have been an assumption in this litigation that Lubavitch would win if it could show that the Building Authority enacted Rule 13 out of a desire to punish Lubavitch for the exercise of its constitutional rights.

Claims of retaliation admittedly almost always turn on the issue of motive. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (holding that a public employee must show "the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech"). An examination of the cases cited in the briefs, however, indicates that both parties fundamentally misconceive the nature of retaliation claims. The broad, sweeping language cited by the parties is belied by the facts of the cases themselves. Indeed, to allow a retaliation cause of action against the Building Authority in this case would be a huge and unwarranted extension of established retaliation doctrine.

Of the 21 cases cited in the briefs and referenced in the District Court's opinion regarding the proper standard for retaliation claims, 16 were claims brought by either public

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U.S. 652, 666 (1925); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

employees or prisoners. [6] Those numbers alone should have suggested caution when considering Lubavitch's atypical retaliation claim. More tellingly, however, *all* of the cases cited involved challenges to discretionary government actions taken vis-a-vis individual citizens. *None* of these cases involved a challenge to the mere adoption of a rule, let alone a prospective and generally applicable rule like the Building Authority's Rule 13.

Indeed, retaliation case law demonstrates that retaliation causes of action are challenges to the *application* of governmental rules, not to the rules themselves. Consider a typical retaliation case. A public employee will claim that she was denied a promotion because she has exercised some right, say affiliating with a certain political party. The government employer typically responds that the employee failed to get the promotion not because of her politics but

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[6] *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983); *Board of Education v. Pico*, 457 U.S. 853 (1982); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469 (7th Cir. 1995); *Hale v. Townley*, 19 F.3d 1068 (5th Cir. 1994); *Gagliardi v. Village of Pawling*, 18 F.3d 188 (2d Cir. 1994); *Cromley v. Board of Education*, 17 F.3d 1059 (7th Cir. 1994); *Gooden v. Neal*, 17 F.3d 925 (7th Cir. 1994); *Brookins v. Kolb*, 990 F.2d 308 (7th Cir. 1993); *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307 (7th Cir. 1989); *Rakovich v. Wade*, 850 F.2d 1180 (7th Cir. 1988) (en banc); *Harris v. Fleming*, 839 F.2d 1232 (7th Cir. 1988); *Howland v. Kilquist*, 833 F.2d 639 (7th Cir. 1987); *Button v. Harden*, 814 F.2d 382 (7th Cir. 1987); *Harvey v. Merit Systems Protection Bd.*, 802 F.2d 537 (D.C. Cir. 1986); *Perry v. Larwon*, 794 F.2d 279 (7th Cir. 1986); *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir. 1985); Matzker v. Herr, 748 F.2d 1142 (7th Cir. 1984); *Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983); *Buise v. Hudkins*, 584 F.2d 223 (7th Cir. 1978); *Burton v. Kuchel*, 865 F. Supp. 456 (N.D. Ill. 1994).

because of some independent, neutral rule (*e.g.*, she was less qualified than other applicants). The employee never disputes that the independent reason is a valid criterion. Rather, the employee will allege only that the rule is being applied arbitrarily or unequally to her.

Retaliation claims are undoubtedly vital to constitutional law. No matter how constitutionally sound a given rule may be, the repeated misapplication or selective application of the rule could create an entirely unconstitutional policy. An official hiring policy that disregards political affiliation, for example, could be no different in its objective, discernible effect than a policy of hiring only Democrats if the official policy is misapplied or ignored.

Nonetheless, courts will not sustain a retaliation claim where a plaintiff challenges only the enactment of a prospective, generally applicable rule. Executive and legislative branches of government must not be paralyzed by the prospect of a retaliation claim (and the attendant fact-based motive inquiry [7]) whenever they make new

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[7] Pretext and motive are almost automatically relevant in retaliation cases because courts cannot easily determine whether the government is applying its rules equally and fairly. Because cases come before courts one at a time, the details of any particular case may obscure a covert pattern of discrimination against those exercising certain constitutional rights. The only indicator a judge may have of what policy was really being followed may be the motives of the government actors. Motive is relevant not because government officials' thoughts have any constitutionally cognizable psychokinetic effect on constitutional rights, but rather because those thoughts are the best indicator to the courts of what policy the government is actually putting into effect. *Cf. Kagan, supra*, at 457 (discussing how courts cannot easily determine, in the context of administrative action, when a content-based decision has occurred).

policy that is arguably in response to someone's speech or lawsuit. Suppose, for example, that a group of drug addicts successfully sues to get disability benefits for their addiction and Congress subsequently amends the law to prohibit benefits to drug addicts. No one would reasonably suggest that Congress's motives would then be subject to a retaliation inquiry just because it acted in response to the addicts' success in the courts.

Plaintiffs can, of course, attack the substance of a rule as being facially unconstitutional. *See, e.g., Saia v. New York*, 334 U.S. 558, 559-60 (1948) (striking down ordinance giving unfettered discretion to local officials regarding speaker permits); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 100 (1947) (Congress may not "enact a regulation providing that no Republican ... shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work"). And government officials cannot escape a retaliation claim simply by dressing up individualized government action to look like a general rule. A policy that prohibited all lobby displays by groups that had put up displays during the previous December, for example, would be neither prospective nor generally applicable. Plaintiffs may not, however, use a retaliation claim to challenge a truly prospective and generally applicable rule that is even-handedly enforced.

In short, retaliation claims protect constitutional rights only against their *unequal* infringement. We recognized as much in *Vukadinovich v. Bartels*, 853 F.2d 1387 (7th Cir. 1988), where a teacher brought both retaliation and equal protection claims after he was dismissed, allegedly for statements he had made to a local newspaper. After disposing of the retaliation claim, we said his equal protection claim alleged "only that he was treated differently

because he exercised his right to free speech" and thus was "a mere rewording of plaintiff's First Amendment-retaliation claim." Id. at 1391-92; *see also Thompson v. City of Starkville, Miss.*, 901 F.2d 456, 468 (5th Cir. 1990) (dismissing plaintiff's equal protection claim in retaliation case because it "amount[ed] to no more than a restatement of his first amendment claim"). In other words, retaliation doctrine protects citizens against those individualized, discretionary government actions where the government's coercive power is greatest, not against government rules that affect both majority and minority alike. [8/]

Returning to the specifics of this case, Rule 13 is unequivocally a prospective and generally applicable rule because it bans all private displays henceforth. Furthermore, no one has even hinted that the rule has been or is being applied unequally. Lubavitch therefore has not stated facts sufficient for a retaliation claim. To hold otherwise would be a significant expansion of retaliation doctrine and would encourage only litigiousness and governmental paralysis.

D. *Lubavitch's Viewpoint Discrimination Claim*

Although its retaliation claim can be dismissed with relative ease, Lubavitch presents a more colorable viewpoint discrimination claim. Here Lubavitch alleges that, regardless of whether the Building Authority wanted to

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[8/] We do not imply, however, that retaliation claims arise under the Equal Protection Clause. That clause does not establish a general right to be free from retaliation. *Ratliff v. DeKalb County, Ga.*, 62 F.3d 338, 341 (11th Cir. 1995); *see also Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 43-45 (1st Cir. 1992). We suggest only that the retaliation protection provided by other clauses of the Constitution is limited to claims against the unequal application of discretionary government power.

retaliate because of Lubavitch's litigation success, the Building Authority's overarching intent to discriminate against the menorah display (and against religious displays generally) makes Rule 13 an unconstitutional viewpoint-based regulation of speech. [2/]

Because the City-County Building lobby is government property, the constitutionality of a regulation of speech on that property hinges on what has been called "forum analysis." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). Although "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property," *id.* at 799-800, any regulation of speech on government property must still withstand some constitutional scrutiny.

The exact constitutional standard depends on whether the government is trying to regulate a "public forum" or a "nonpublic forum." Property can be designated as a public forum either by tradition or by law. *Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2446 (1995). Traditional public fora are properties like streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for

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[2/] Although Lubavitch's viewpoint discrimination claim clearly derives from a long line of Free Speech Clause case law, Lubavitch argues on appeal that amended Rule 13 also violates the Establishment Clause. Lubavitch's general invocation of the First Amendment in its complaint, however, is far too broad to preserve an Establishment Clause claim raised for the first time on appeal. Like the Fourteenth Amendment, the First Amendment is "a vast umbrella, and to preserve a claim under it for consideration by an appellate court you must tell the court just what spot of ground beneath the umbrella you're standing on." *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 420 (7th Cir. 1988).

purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)). Legally created public fora are fora such as school board meetings and municipal theaters where the government has intentionally — not by inaction or by permitting limited discourse — opened a nontraditional forum for public discourse. *See Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 45-46. Any remaining government property is considered a nonpublic forum. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992).

Given their greater importance to the free flow of ideas, public fora receive greater constitutional protection from speech restrictions. Any speech regulation in a public forum must be either 1) a reasonable, content-neutral time, place, and manner restriction, or 2) narrowly drawn to advance a compelling state interest. *Capitol Square*, 115 S. Ct. at 2446. As Justice Brennan explained in his *Perry* dissent, content-neutrality is a particularly strong constitutional standard that "prohibits the government from choosing the subjects that are appropriate for public discussion." *Perry*, 460 U.S. at 59 (Brennan, J., dissenting). In other words, content-neutrality not only forbids discrimination against particular viewpoints on a subject (what Justice Brennan called "censorship in its purest form," id. at 62, but also prevents the government from even limiting discussion in public fora to specific subjects. A content-neutral regulation is thus both viewpoint-neutral and subject-neutral. *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2517 (1995) ("[D]iscrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination.").

The constitutional standard governing speech regulations in nonpublic fora is less certain. The Supreme Court has elaborated on the standard in a number of cases, but the Court's language has not always been entirely consistent. The cases have unequivocally held that any speech regulation in a nonpublic forum must be "reasonable in light of the purposes served by the forum." *Rosenberger*, 115 S. Ct. at 2517; *Lamb's Chapel v. Center Moriches Union Free School District*, 115 S. Ct. at 2517 (1993); *Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 49; *see also Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 n. 7 (1981). The cases have been less definitive, however, regarding the neutrality standard that a nonpublic forum speech regulation must meet. In *Postal Service v. Council of Greenburgh Civic Ass'ns*, the Court said that such speech restrictions must be content-neutral. Id. In Perry and Cornelius, however, the Court shifted its focus to viewpoint discrimination and particularly to the intent to discriminate against specific viewpoints. The Court stated that a regulation must not be "an effort to suppress expression merely because public officials oppose the speaker's view," Perry, 460 U.S. at 46, and similarly that a regulation must not be "in reality a facade for viewpoint-based discrimination," *Cornelius*, 473 U.S. at 811. In its most recent cases, meanwhile, the Court has said that nonpublic forum regulations must be viewpoint neutral, making no mention of impermissible intent. *See Rosenberger*, 115 S. Ct. at 2517; *Lamb's Chapel*, 113 S. Ct. at 2147.

We need not decide whether the City-County Building lobby is a public forum because Lubavitch has conceded for the purposes of its preliminary injunction motion that the lobby is a nonpublic forum. We must determine, however, the appropriate standard under which to review Rule 13. The Court has clearly abandoned the content-neutrality

standard, but the relevance of motive in the Court's opinions has varied. We must therefore determine whether the subjective language in *Perry* and *Cornelius* (suggesting that the mere intent to discriminate against a viewpoint is sufficient for a constitutional violation) survives the more recent cases that suggest a more objective measure of viewpoint-neutrality.

Whatever the Court's language in recent cases, the Court's actions are both more telling and more binding than any mere dicta. And the motive language in earlier cases cannot be dismissed as mere dicta because the Court in *Cornelius* remanded the case to determine whether the speech restriction at issue was "impermissibly motivated by a desire to suppress a particular point of view." 473 U.S. at 812-13. Nonetheless, we view the present case as distinguishable from these prior precedents because the Court never considered a *content*-neutral speech restriction like Rule 13. Rather, the Court's concern about motivation arose only in cases where the Court was considering speech restrictions that explicitly discriminated on the basis of content.

Motive becomes keenly relevant in cases that involve content discrimination because the line between viewpoints and subjects is such an elusive one. Because subject matter discrimination is clearly constitutional in nonpublic fora, *see Perry*, 460 U.S. at 49, classifying a particular viewpoint as a subject rather than as a viewpoint *on a subject* will justify discrimination against the viewpoint. This inherent manipulability of the line between subject and viewpoint has forced courts to scrutinize carefully any content-based discrimination. *See Air Line Pilots Ass'n v. Department of Aviation*, 45 F.3d 1144, 1159-60 (7th Cir. 1995) (warning courts against retreating to an exaggerated level of generality when examining content-based regulations). Courts thus

have struggled, for example, with the issue of whether religious discussion should be categorized as a subject (and therefore excludable from a nonpublic forum) or as a viewpoint (and therefore constitutionally protected). *See Rosenberger*, 115 S. Ct. at 2517-18; *Grossbaum I*, 63 F.3d at 589-92. The Supreme Court faced a similar issue in *Cornelius* where it was understandably dubious of the argument that excluding all advocacy groups, regardless of political orientation, from a government charity drive was just subject matter discrimination rather than viewpoint discrimination. 473 U.S. at 811-12. Because the government was distinguishing among groups based on the content of their messages (either advocacy or nonadvocacy), the Court remanded the case to see whether the government was really targeting certain viewpoints.

Where, however, the government enacts a content-neutral speech regulation for a nonpublic forum, there is no concern that the regulation is "in reality a facade for viewpoint-based discrimination," *Cornelius*, 473 U.S. at 811. Whatever the intent of the government actors, all viewpoints will be treated equally because the regulation makes no distinctions based on the communicative nature or impact of the speech. A facade for viewpoint discrimination, in short, requires discrimination behind the facade (*i.e.*, some viewpoint must be disadvantaged relative to other viewpoints). Courts do have a hard call to make when they review content-based speech regulations because the government could be shutting out some viewpoints by labelling them as subjects. Motive may thus be a vital piece of evidence that courts must use to judge the viewpoint-neutrality of the regulation. When the government restricts speech in a content-neutral fashion, however, all viewpoints

— from the Boy Scouts to the Hare Krishnas — receive the exact same treatment. [10/]

Indeed, the Supreme Court suggested in *Capitol Square* that content-neutral regulations are free from motive inquiries even in public forum cases. The Court there considered the denial of a permit to the Ku Klux Klan for the erection of a Latin cross in a public forum, even after the government had granted permission for a Christmas tree and a menorah to be displayed. Eight members of the Court joined behind the proposition that the State of Ohio "could ban all unattended private displays in [the forum] if it so desired." *Capitol Square*, 115 S. Ct. at 2457 (Souter, J., concurring in part and concurring in the judgment); *see also id.* at 2446; *id.* at 2467-68 (Stevens, J., dissenting). This proposed course of action would seem impossible, however, if Ohio's undisputed desire to keep the Klan off of government property would be sufficient to establish viewpoint discrimination. And if eight justices thought Ohio was free, even after it had discriminated against the Klan, to ban all private displays in a public forum, then the Building

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[10/] It should be noted that content-neutrality requires not only facial neutrality but also some semblance of general applicability. *Cf. Church of the Lukumi Babalu Aye*, 113 S.Ct. 2226-33 (discussing neutrality and general applicability as the touchstones of Free Exercise Clause analysis); *id.* at 2239 (Scalia, J., concurring in part and concurring in the judgment); *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879-81 (1990). A regulation that prohibited all private groups from displaying nine-pronged candelabra may be facially neutral, but it would still be unconstitutionally discriminatory against Jewish displays. The lack of general applicability is obvious not from the government's motives but from the narrowness of the regulation's design and its hugely disproportionate effect on Jewish speech. *Cf.* Tribe, *supra*, at 34.

Authority *a fortiori* should have the same freedom to prohibit all private displays in its nonpublic forum. [11/]

In sum, content-neutral speech regulations in nonpublic fora pass constitutional muster regardless of motive for the same reason that retaliation claims are inoperative against generally applicable rules. When a government body acts at a sufficiently high level of generality, there is no need for courts to search the minds of government actors for invidious motives that might indicate unconstitutional discriminatory effect. And it is this unconstitutional effect that ultimately matters. "[A] facially neutral government action that does not in fact ... violate anyone's constitutional rights or any constitutional principle ... should not be rendered unconstitutional, or even suspect, just by virtue of the factors considered by, or the attitudes or intentions held by, the public officials responsible for that action...." Tribe, *supra*, at 28-29; *cf.* Kagan, *supra*, at 505-17.

Moreover, we are mindful of Judge Easterbrook's observation that real world actors such as the Building Authority need *ex ante* guidance from our decisions, not just *ex post* judicial critiques:

11/ Our holding today is expressly limited to speech regulations in nonpublic fora. We express no opinion on the harder issue of whether motive is relevant in public forum cases. The nonpublic forum case is easier because of the stronger government interest in controlling property not dedicated to public discourse, *see Perry*, 460 U.S. at 49, and because of the lesser role that nonpublic fora generally play in the marketplace of ideas, *see* Richard A. Posner, *Free Speech in an Economic Perspective*, 20 Suffolk U.L. Rev. 1, 52 (1986).

> People are entitled to know the legal rules before they act, and only the most compelling reason should lead a court to announce an approach under which no one can know where he stands until litigation has been completed. Litigation is costly and introduces risk into any endeavor; we should struggle to eliminate the risk and help people save the costs. Unless some obstacle such as inexperience with the subject, a dearth of facts, or a vacuum in the statute books intervenes, we should be able to attach legal consequences to recurrent factual patterns.

Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring). The past year of litigation, the more than 900 pages of depositions fishing for an inculpatory admission by the Building Authority, and the thousands of taxpayer dollars spent on legal expenses for this case only underscore the point. This motive game is not worth the candle.

The only possible issue remaining is whether Rule 13 is reasonable in light of the purposes served by the City-County Building lobby. Although Lubavitch did not explicitly challenge Rule 13 on reasonableness grounds separate from its viewpoint discrimination claim, Lubavitch clearly did argue that the unreasonableness of Rule 13 was evidence that the Building Authority's motives were pretextual. Assuming for the sake of argument that this was sufficient to raise the reasonableness issue, we are confident that the District Court did not abuse its discretion when it denied Lubavitch's motion for a preliminary injunction. "The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*,

473 U.S. at 808. The District Court found a number of reasonable justifications for the new Rule 13, 909 F.Supp. at 1205, 1207, 1209-10, and all are well within the bounds of what rational basis scrutiny permits.

In closing, nothing in this opinion should be construed as undermining Lubavitch's hardfought success in its previous appeal to this court. Lubavitch clearly struck a blow for the freedom of speech when it challenged the Building Authority's earlier policy that discriminated against religious displays. Lubavitch's prior victory against the Building Authority does not, however, give Lubavitch immunity against all subsequent Building Authority actions that, although nondiscriminatory, happen to be disadvantageous to Lubavitch.

The decision of the District Court to deny preliminary injunctive relief is AFFIRMED.

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Appeals for the Seventh Circuit

Appendix B

No. IP 94-1801-C.
United States District Court,
S.D. Indiana,
Indianapolis Division.

Rabbi Abraham GROSSBAUM and
Lubavitch of Indiana, Inc.,

Plaintiffs,

v.

INDIANAPOLIS-MARION COUNTY BUILDING
AUTHORITY and Ronald L. Reinking, in his
capacity as General Manager,

Defendants.

Dec. 15, 1995.

MEMORANDUM OPINION ON PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION

HAMILTON, District Judge.

On October 2, 1995, defendant Indianapolis-Marion County Building Authority ("Building Authority") revised one of its rules so as to prohibit all private uses of the lobby of the City-County Building in downtown Indianapolis. Plaintiffs Rabbi Abraham Grossbaum and Lubavitch of Indiana, Inc. wish to display a five-feet tall wooden menorah in the lobby, as they have done in the past. Plaintiffs agree that the Building Authority's new policy is facially constitutional because it is viewpoint-neutral. They also agree that the Building Authority has the right to close what had been a "nonpublic forum." The new policy therefore does not suffer from the First Amendment defect found by

the Court of Appeals in an earlier policy that banned displays of seasonal religious symbols. *See Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 63 F.3d 581 (7th Cir.1995).

However, the new facially neutral policy still does not let plaintiffs do what they want to do: display their menorah in the lobby of the City-County Building. Plaintiffs have filed an amended complaint and a new motion for preliminary injunction. They assert that even though the new policy is facially neutral and closes the forum to all private uses, it still violates plaintiffs' First Amendment rights solely because the Building Authority acted with improper motives when it approved the new policy. Specifically, plaintiffs contend the Building Authority acted with one or more of the following unconstitutional motives when it closed the forum to everyone: (1) a desire to retaliate against these plaintiffs for suing the defendants in this action; (2) a desire to retaliate against these plaintiffs for their religious expression; and (3) an intent to discriminate against these plaintiffs' religious beliefs in particular and/or religion in general. The parties have quickly compiled and presented a substantial volume of evidence concerning the reasons for the Building Authority's decision. That volume of evidence and the speed with which it must be analyzed account for much of the length of this opinion. Despite that length, the court's decision ultimately turns on a factual determination about the Building Authority's motives in adopting the facially constitutional policy. On the existing record, the court finds that the defendants did not act with any improper motive when they decided to "close" the forum by prohibiting all private displays in the common areas of the building. Because plaintiffs have not shown they are reasonably likely to succeed on the merits of their claims, the court denies plaintiffs' motion for a preliminary injunction.

I. BACKGROUND

Plaintiff Rabbi Abraham Grossbaum is an Orthodox Jewish rabbi affiliated with the Lubavitch Hasidic movement. He is a resident of Indianapolis. He is also the Executive Vice President of plaintiff Lubavitch of Indiana, Inc., which is a private, non-profit Orthodox Jewish organization incorporated under the laws of Indiana. Defendant Indianapolis-Marion County Building Authority is a municipal corporation organized under the laws of Indiana. The Building Authority is responsible for managing the City-County Building in downtown Indianapolis which houses a number of city and county agencies of government and some private tenants. Defendant Ronald L. Reinking is the general manager of the Building Authority. He administers the rules and regulations of the Building Authority and is responsible for granting or denying requests to use the lobby of the City-County Building for displays.

From 1985 through 1992, plaintiffs requested and received permission from the Building Authority to display their five-feet tall menorah in the lobby of the City-County Building during Chanukah. [1/] In 1992 the Indiana Civil Liberties Union and the Jewish Community Relations Council questioned the display of the menorah in a public building like the City-County Building. In October 1993, the Building Authority adopted a new "Policy on Seasonal Displays" which prohibited displays of seasonal religious symbols in the lobby and other common areas of the building. Pursuant to that policy, plaintiffs were not permitted to display their menorah in 1993.

[1/] A menorah is a nine-pronged candelabrum that is displayed during the eight days of Chanukah and is lit each night of the festival. It is a religious symbol associated with the Jewish holiday.

Before Chanukah in 1994, plaintiffs filed this action and sought a preliminary injunction against enforcement of the Policy on Seasonal Displays. Plaintiffs argued that the policy banned only seasonal *religious* displays, which amounted to viewpoint discrimination concerning expression in the forum on the subject of "the holiday season." See *Lamb's Chapel v. Center Moriches Union Free School Dist.*, --- U.S. ----, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). On November 22, 1994, this court denied plaintiffs' motion for a preliminary injunction. *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 870 F. Supp. 1450 (S.D. Ind. 1994). On November 29, 1994, the Court of Appeals issued an injunction pending appeal that enjoined enforcement of the Policy on Seasonal Displays. The Building Authority therefore permitted plaintiffs to display their menorah in the lobby of the City-County Building. Several other individuals and groups also applied for and received permission from the Building Authority to place religious displays in the lobby of the City-County Building. On August 15, 1995, the Court of Appeals reversed this court's decision and held that the Building Authority's Policy on Seasonal Displays subjected plaintiffs to unconstitutional viewpoint discrimination. *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 63 F.3d 581 (7th Cir. 1995).

With that background, we come to the more recent events at issue today. On August 28, 1995, Rabbi Grossbaum requested permission from the Building Authority to place a menorah display in the lobby of the City-County Building during Chanukah in 1995. The Building Authority board of directors met on September 5, 1995, and discussed the possibility of amending the rules that govern access to the common areas of the City-County Building for display purposes. On October 2, 1995, the board met in executive session to discuss the present litigation. After the executive session, the board met in a public session and amended the rules governing use of the common areas in the building.

The board voted to: (a) amend its "Rule 13" to prohibit all private displays in the common areas, including the lobby; (b) modify slightly the rule prohibiting political uses of the building; and (c) rescind the Policy on Seasonal Displays that the Court of Appeals had held unconstitutional. Relying on the amended Rule 13, Mr. Reinking wrote to Rabbi Grossbaum the next day denying his request to erect the menorah display in the lobby in 1995.

Plaintiffs then investigated the new rule and took depositions of Mr. Reinking, his assistant, and all five members of the Building Authority board. On November 29, 1995, plaintiffs filed an amended complaint and a second motion for preliminary injunction, this time seeking an injunction against enforcement of the new Rule 13 prohibition on all private displays in the lobby and other common areas. Plaintiffs do not challenge the *facial* constitutionality of the prohibition. Instead, they claim the new policy is unconstitutional because the Building Authority adopted it for one or more of three unconstitutional purposes: (1) to retaliate against plaintiffs for having sued the Building Authority; (2) to retaliate against plaintiffs for exercising their free speech rights by displaying the menorah; and/or (3) to discriminate against either plaintiffs' viewpoint or all religious viewpoints toward the holiday season. Chanukah begins at sundown on Sunday, December 17, 1995. The parties have submitted briefs, documentary exhibits, and extensive passages from depositions. At a hearing on December 11, 1995, both sides presented oral argument. This opinion states the court's findings of fact and conclusions of law for purposes of Fed. R. Civ. P. 65 and 52.

II. Preliminary Injunction Standard

Before the court may enter a preliminary injunction, the plaintiff must demonstrate "(1) some likelihood of

succeeding on the merits, and (2) that it has 'no adequate remedy at law' and will suffer 'irreparable harm' if preliminary relief is denied." *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992). If those elements are not satisfied, then the inquiry is over and the preliminary injunction must be denied. If those elements are met, the court then proceeds to consider "(3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties." *Abbott Labs.*, 971 F.2d at 11-12. Accord, *e.g., Vencor, Inc. v. Webb*, 33 F.3d 840, 845 (7th Cir. 1994); *Lawson Products, Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986).

There is no precise standard for the quantum of evidence required to obtain a preliminary injunction. Rather, the strength of the evidence and the potential harms involved are factors balanced on what the Seventh Circuit has called a discretionary sliding scale:

> The [district] court, sitting as would a chancellor in equity, ... "weighs" all four factors in deciding whether to grant the injunction, seeking at all times to "minimize the costs of being mistaken." We call this process the "sliding scale" approach: the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side; the less likely it is the plaintiff will succeed, the more the balance need weigh towards its side. This weighing process, as noted, also takes into consideration the consequences to the public interest of granting or denying preliminary relief. While we have at times framed the

> sliding scale approach in mathematical terms, it is more properly characterized as subjective and intuitive, one which permits district courts to "weigh the competing considerations and mold appropriate relief."

Abbott Labs., 971 F.2d at 12 (citations and footnote omitted). Accord, *Vencor*, 33 F.3d at 845; *Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 314 (7th Cir. 1994). *See also* 11A Wright, Miller & Kane, Federal Practice & Procedure § 2948.3, at 189-97 (1995).

III. Likelihood of Success on the Merits

The parties agree that the Building Authority's new Rule 13 is facially neutral. By stipulating for purposes of the plaintiffs' motion for preliminary injunction that the building lobby is a "nonpublic forum," the parties also agree that the First Amendment permits the Building Authority to exclude all private displays using such a facially neutral standard. See *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788, 806, 105 S. Ct. 3439, 3451, 87 L. Ed. 2d 567 (1985) (government may limit access to nonpublic forum to particular class of speakers); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37,46, 49, 103 S. Ct. 948, 955, 957, 74 L. Ed. 2d 794 (1983) (government may restrict access to nonpublic forum based on identity of speaker). However, even facially neutral policies may violate the First Amendment if they are adopted for an unconstitutional purpose, including retaliation against a person for engaging in constitutionally protected conduct, *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84, 97 S. Ct. 568, 574-75, 50 L. Ed. 2d 471 (1977), or a desire to suppress speech expressing a particular viewpoint or group of viewpoints, *Cornelius*, 473 U.S. at 812, 105 S. Ct. at 3454. Plaintiffs therefore attempt to show that the new Rule 13 is unconstitutional

because the Building Authority had an unconstitutional motive in adopting the new rule. The court's detailed factual findings may be more intelligible if the law governing those claims is set out first.

A. Retaliation Standard

Plaintiffs assert two different theories of retaliation. They claim that the Building Authority amended Rule 13 to retaliate for their filing of this lawsuit and/or to retaliate for their exercise of free speech rights. Plaintiffs are careful to distinguish between retaliation *for the lawsuit* and retaliation *against their speech rights* several times in their amended complaint and brief. Citizens have a right under the First Amendment to petition their governments for a redress of grievances by, among other things, filing lawsuits. If a government tries to punish a person for exercising that constitutional right, the person may assert a claim for retaliation, as plaintiffs have done here. *See Harris v. Fleming*, 839 F.2d 1232, 1238 (7th Cir. 1988) (collecting other Seventh Circuit cases on constitutional right of access to the courts). See generally *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. at 283-84, 97 S. Ct. at 574-75 (retaliation against constitutionally protected activity is actionable); *Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir. 1988) (*en banc*) (same). The constitutional right on which plaintiffs rely in making their other claim of retaliation is their past and future free speech right to display the menorah. Although both of these theories can be called "retaliation," plaintiffs point out that they are conceptually distinct.

To prevail on their claim of retaliation for asserting free speech rights, plaintiffs must show that defendants acted out of hostility to plaintiffs' speech — that is, the expressive content of the menorah. On this theory, plaintiffs must show that the defendants acted based on hostility toward religion in general or toward plaintiffs' faith in particular. The proof

necessary for plaintiffs' Free Speech theory of retaliation is the same proof needed to establish their viewpoint discrimination claim under the Free Speech Clause. In claiming viewpoint discrimination, plaintiffs allege that the defendants' ban on all private displays in the City-County Building was motivated by a subjective hostility toward religion in general or plaintiffs' faith in particular. Since both the retaliation claim and the viewpoint discrimination claim under the free speech theory are based on the same proof and require no analytically distinct treatment, the court will evaluate both of those claims in terms of viewpoint discrimination.

On their claim of retaliation for filing the lawsuit, plaintiffs argue that this court, as finder of fact, may infer that the defendants harbored the impermissible motive — revenge over the lawsuit — if it finds that the defendants amended Rule 13 "in response" to the lawsuit which resulted in the Seventh Circuit decision adverse to the defendants. Plaintiffs point out correctly that they need not produce direct evidence of an intent to retaliate. That intent may be inferred from circumstantial evidence, including what plaintiffs say is a suspicious chronology of events. However, plaintiffs also go a step farther and argue that the court need not find that defendants were hostile toward plaintiffs. They contend that so long as the court finds that the defendants acted "in response" to the constitutionally protected activity — the lawsuit — and that the lawsuit was a "but for" cause of the defendants' action, the court may (and perhaps must) find retaliation.

Plaintiffs' approach to "retaliation" obscures a critical distinction in this case. "Retaliation" is not the legal or linguistic equivalent of "response." The distinction is between a losing litigant who is angry or hostile toward the prevailing party — who wants to "get even" for the lawsuit — and a losing litigant who considers several options for

correcting the underlying violation and chooses one of several permissible ways to remedy it, without any desire for revenge or punishment. In both situations the litigation — the "protected activity" — is a "but for" cause of the losing party's response. But the law of retaliation focuses on the desire to punish or get even. *E.g., Egger v. Phillips*, 710 F.2d 292, 320 (7th Cir. 1983) (*en banc*) (material issue in free speech retaliation claim by public employee was whether defendant transferred plaintiff out of concern for effective functioning of office or "out of a desire to punish him for speaking out"); *Harvey v. Merit Systems Protection Bd.*, 802 F.2d 537, 547 (D.C. Cir. 1986) ("retaliation is to be defined broadly to include any action *designed to punish an employee for exercising his protected rights* or to deter him from exercising those rights") (emphasis added).

The difference is critical in this case because of both the nature and the context of the underlying constitutional violation. The relevant context is that the defendants' Policy on Seasonal Displays was not adopted because the defendant disliked plaintiffs or their religious beliefs. As discussed in detail below, the record as a whole shows that the policy was adopted because of constitutional concerns about the private display of religious symbols in the halls of government. The Justices' opinions in *Capitol Square Review and Advisory Bd. v. Pinette*, --- U.S. ----, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995), illustrate the fact that reasonable people can and do disagree on such questions without being hostile toward a particular faith or religion in general.

The nature of the underlying violation is critical here because it was not the *denial* of access to the forum that was held unconstitutional, but the *discriminatory* denial of access. *See Grossbaum*, 63 F.3d at 595-96 (policy denied plaintiffs' rights to free expression in nonpublic forum created by the Building Authority *on the same terms as all other persons*,

regardless of religious or non-religious nature of message). That violation could be remedied by opening access to the forum more widely, as plaintiffs wish. But the violation could also be remedied by closing off access to the forum. The Supreme Court's decisions in this area show that the owner of a nonpublic forum always has the right to close the forum or to impose new nondiscriminatory restrictions on access. *E.g., Cornelius*, 473 U.S. at 802, 105 S. Ct. at 3448-49; *Perry Educ. Ass'n*, 460 U.S. at 46, 103 S. Ct. at 955-56. The Court has recently reaffirmed a government's right to control its property, including the right to close a previously open forum:

> The fact that the Capitol lawn has been the site of public protests and gatherings, and is the location of any number of the government's own unattended displays, such as statues, does not disable the State from closing the square to all privately owned, unattended structures.

Capitol Square Review and Advisory Board v. Pinette, --- U.S. at ----, 115 S. Ct. at 2457 (Souter, J., concurring in part and concurring in judgment, joined by O'Connor and Breyer, JJ.); see *id.* at ----, 115 S. Ct. at 2467 (Stevens, J., dissenting) (expressly agreeing with this point). Accord, *Rosenberger v. Rector and Visitors of University of Virginia*, --- U.S. ----, ---- - ----, 115 S. Ct. 2510, 2516-17, 132 L.Ed.2d 700 (1995) ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.") (citing *Cornelius* and *Perry*).

Thus, when the Court of Appeals held that the Policy on Seasonal Displays violated the First Amendment, the Building Authority had a choice between constitutional alternatives. It could either leave its other policies alone,

thus leaving the nonpublic forum with few restraints on access, or it could impose new, nondiscriminatory restrictions on that access. In making its decision, the owner of a nonpublic forum does not violate the First Amendment by considering the costs of litigation, the resources needed to administer the various options, or the results of litigation thus far. As plaintiffs conceded at the hearing, the Building Authority was entitled to respond to the Court of Appeals' decision, so long as it did so with a proper motive. In addition, the facially neutral policy of closing the forum is clearly a constitutionally permissible option. The owner does not lose that option when it loses a lawsuit. However, the owner does violate the First Amendment if it makes its choice among permissible options based on a desire to get even with or punish a person who has sued it. *See Egger v. Phillips*, 710 F.2d at 320 (issue was whether defendant acted "out of a desire to punish [plaintiff] for speaking out"); *Hale v. Townley*, 19 F.3d 1068, 1073 (5th Cir. 1994) ("state officials may not take retaliatory action against an individual *designed* either *to punish him* for exercising his constitutional right to seek judicial relief or to chill his exercise of that right in the future") (emphasis added); *Gagliardi v. Village of Pawling*, 18 F.3d 188, 195 (2d Cir. 1994) ("The ultimate question of retaliation involves a defendant's motive and intent ...").

The parties have argued opposing positions about what evidence is needed to *permit* a finding of retaliatory motive. That question is often litigated in constitutional claims, labor law, and employment discrimination cases, especially where there are problems of so-called "mixed motives." *See, e.g., Mt. Healthy*, 429 U.S. at 285-87, 97 S. Ct. at 575-76; *Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469, 481-82 (7th Cir. 1995) (claims of retaliation under both Title VII and First Amendment); *Rakovich v. Wade*, 850 F.2d at 1189-91. The question of causation can be difficult when the evidence shows that the

defendant had some permissible reasons for its decision but also considered some improper reasons. *Mt. Healthy* teaches that in the constitutional setting, the finder of fact must decide whether the defendant would have made the same decision even if the improper reasons had not been present. These "mixed-motive" cases dealing with causation all assume, however, that the finder of fact either has found or would be permitted to find an improper motive. In this case, the court need not reach the question of causation with mixed motives.

In this case, the decisive issue is not whether this lawsuit was a "but for" cause of the Building Authority's new policy. Clearly, it was. The decisive issue is whether the Building Authority was in fact motivated by a desire to punish or get even with plaintiffs for having brought this lawsuit. That is the essence of "retaliation," and that is what plaintiffs must prove to succeed on their claim of retaliation for this litigation. The rule that plaintiffs advocate, which would allow a finder of fact to infer retaliatory intent when the evidence shows only that the owner has lost a lawsuit and then, in response, chooses another facially permissible option that does not satisfy the prevailing plaintiff, would reach beyond truly retaliatory action and would prevent owners of public property from honestly remedying constitutional problems in their past rules in ways that are consistent with both their constitutional obligations and their rights to control their property.

B. Viewpoint Discrimination

Plaintiffs' claim of viewpoint discrimination presents different legal issues. Government property managers may regulate the content of speech in a nonpublic forum, but they must be reasonable and viewpoint neutral in doing so. *E.g.*, *Cornelius*, 473 U.S. at 800, 105 S. Ct. at 3447-48. In deciding last year's motion, both this court and the Court of

Appeals discussed at length the rights of government property managers to control access to the property they manage, and especially the law applicable to "nonpublic" forums. *See Grossbaum*, 63 F.3d at 586-88; 870 F. Supp. at 1454-59. In short, government property which has not been traditionally open to the public for all expressive activity or which has not been designated by the government as a place for a full range of expressive activity is a "nonpublic forum." The government may exercise control over access to a nonpublic forum for expressive activity "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, ----, 113 S. Ct. 2141, 2147, 124 L. Ed. 2d 352 (1993) (quoting *Cornelius*, 473 U.S. at 806, 105 S. Ct. at 3451). Accord, *Perry Educ. Ass'n*, 460 U.S. at 49, 103 S. Ct. at 957 ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity."); *Adderley v. Florida*, 385 U.S. 39, 47, 87 S. Ct. 242, 247, 17 L. Ed. 2d 149 (1966) (a state, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated"). Thus, in nonpublic forums, government property managers may reasonably consider whether the content of particular subjects of expression accords with the purpose of the government property and may exclude subjects that do not further that purpose.

The line of cases including *Adderley*, *Perry*, *Cornelius*, and *Lamb's Chapel* has established beyond dispute that even when it regulates speech in a nonpublic forum, the government may not prefer one viewpoint over another on an "otherwise includible subject." See *Cornelius*, 473 U.S. at 806, 105 S. Ct. at 3451. The Supreme Court's decisions in *Rosenberger* and *Lamb's Chapel* also show that

"religion" is rarely a cognizable *subject* that may be totally excluded in a nonpublic forum. Rather, a particular expression that emanates from a religious perspective is likely to be a *viewpoint* that may not be suppressed if other viewpoints on the same general topic are allowed. *See Rosenberger*, --- U.S. at ---- - ----, 115 S. Ct. at 2517-18; *Lamb's Chapel*, 508 U.S. at ----, 113 S. Ct. at 2147; see also *Air Line Pilots Ass'n Int'l v. Dept. of Aviation*, 45 F.3d 1144, 1159 (7th Cir. 1995) ("The appropriate focus of the viewpoint inquiry examines whether the proposed speech dealt with a subject that was 'otherwise permissible' in a given forum."); *Hedges v. Wauconda Community Unit School Dist. No. 118*, 9 F.3d 1295, 1297-98 (7th Cir. 1993) (putting *Lamb's Chapel* in the context of prior viewpoint discrimination cases).

In this case, the Court of Appeals found last year that the defendants' Policy on Seasonal Displays would produce precisely the viewpoint discrimination that *Lamb's Chapel* forbids. See 63 F.3d at 589-92. By its terms, the former policy would have allowed any private persons to the erect a secular holiday display such as a Christmas tree while prohibiting religious holiday displays such as a menorah. Therefore, the policy was held unconstitutional because it was not viewpoint neutral on the subject of the "holiday season." 63 F.3d at 588.

Plaintiffs' claim of viewpoint discrimination this year is quite different. Both sides agree that the policy at issue here, the amended Rule 13, is facially viewpoint-neutral. In fact, Rule 13 does not even express a preference for particular *subjects* over others, which would be permissible in a nonpublic forum. It allows no private displays at all, on any subject. Plaintiffs claim, however, that the defendants adopted this new facially neutral exclusion of all private displays for the *purpose* of discriminating against plaintiffs' viewpoint.

A government property manager acts unconstitutionally when it adopts an apparently evenhanded rule excluding expression if it acts with a motive to discourage or suppress a particular viewpoint. *See Rosenberger*, --- U.S. at ----, 115 S. Ct. at 2516 (when the "rationale for the restriction" is "the specific motivating ideology or the opinion or perspective of the speaker," the government engages in forbidden viewpoint discrimination); *Cornelius*, 473 U.S. at 811, 105 S. Ct. at 3453 ("The existence of reasonable grounds for limiting access to a nonpublic forum ... will not save a regulation that is in reality a facade for viewpoint-based discrimination."); *id.* at 812, 105 S. Ct. at 3454 (such "justifications cannot save an exclusion that is in fact based on the desire to suppress a particular point of view"); *Perry Educ. Ass'n*, 460 U.S. at 49, 103 S. Ct. at 957 (upholding selective access to nonpublic forum in part because there was "no indication that the [government] intended to discourage one viewpoint and advance another"). *See also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, ----, 113 S. Ct. 2217, 2227, 124 L. Ed. 2d 472 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."). In *Cornelius*, the Supreme Court stated that it could not decide without a more developed factual record whether the government's exclusions of certain advocacy groups from the nonpublic forum were based on impermissible motives. 473 U.S. at 812, 105 S. Ct. at 3454. The Court therefore remanded the case for a factual determination as whether the otherwise permissible exclusion of some groups from the nonpublic forum "was impermissibly motivated by a desire to suppress a particular point of view." *Id.* at 812-13, 105 S. Ct. at 3454-55. Similarly here, the focus must be on the Building Authority's motives in amending Rule 13, for motive is the

only basis upon which plaintiffs challenge the constitutionality of the rule.

The cases in this area also illustrate that even if the government does not itself possess the illicit motive, it may act unconstitutionally if it adopts or regulates in deference to the hostility of another party toward a particular viewpoint. In *Air Line Pilots Ass'n v. Dept. of Aviation*, the Seventh Circuit held that a government property manager may not bar a speaker's message solely in an effort to cater to the objections of others. 45 F.3d at 1157. Moreover, the Supreme Court warned in Cornelius that if a government property manager's purported justification for excluding certain groups was to quell controversy, the purpose could be permissible, but the asserted purpose could be "in reality a facade for viewpoint-based discrimination." 473 U.S. at 811, 105 S. Ct. at 3454. *Cf. May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1109 (7th Cir. 1986) (desire to avoid potentially disruptive controversy and to maintain appearance of neutrality could justify viewpoint neutral exclusion of speakers from nonpublic forum).

C. Proving Motive

To prevail on their new claims, plaintiffs must persuade the finder of fact that these defendants acted with an unconstitutional motive. In this case, plaintiffs have raised some evidentiary objections that require close attention to permissible methods of proving unconstitutional motive. For example, they have objected to testimony from Mr. Reinking, his assistant, and Building Authority board members about the reasons the Building Authority amended Rule 13 and about some details of the board's discussions that are not reflected in the board's official minutes. The court has overruled the plaintiffs' objections to that evidence,

but a more detailed explanation of the reasons may be helpful.

Judges and juries often must try to determine the subjective purpose for which a person took some action--such as firing an employee, or selecting one vendor instead of another. Such inquiries are also common in cases claiming, for example, retaliatory discipline against a prison inmate. In cases challenging the constitutionality of legislation, the Supreme Court has sometimes said that it will not strike down legislation based solely on the motives of the legislators who voted for it. *E.g., Palmer v. Thompson*, 403 U.S. 217, 224, 91 S. Ct. 1940, 1944-45, 29 L. Ed. 2d 438 (1971); *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S. Ct. 1673, 1682-83, 20 L. Ed. 2d 672 (1968). Among the reasons supporting this practice is the difficulty of determining "the" motive for a group of legislators. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, ----, 113 S. Ct. 2217, 2239, 124 L. Ed. 2d 472 (1993) (Scalia, J., concurring) ("it is virtually impossible to determine the singular 'motive' of a collective legislative body") (citing *Edwards v. Aguillard*, 482 U.S. 578, 636-39, 107 S. Ct. 2573, 2605-07, 96 L. Ed. 2d 510 (1987) (Scalia, J., dissenting)); accord, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 702-03, 101 S. Ct. 1309, 1332-33, 67 L. Ed. 2d 580 (1981) (Rehnquist, J., dissenting). In *City of Hialeah* and *Edwards*, however, a majority of the Court did consider evidence of legislative motives and struck down the challenged laws in those cases based on that evidence despite the potential difficulties. But in cases where the substantive constitutional claim does not depend on subjective motive, courts may refuse even to consider evidence offered to prove motive. *See, e.g., Government Suppliers Consolidating Services, Inc. v. Bayh*, 133 F.R.D. 531, 539 (S.D. Ind. 1990) (refusing to allow discovery of "motive" evidence in dormant Commerce

Clause case because motive did not affect constitutionality of statute); *see* generally *Goldberg v. Whitman*, 743 F. Supp. 943, 947-53 (D. Conn. 1990) (distinguishing between constitutional claims that require motive analysis and those that do not).

Despite the difficulties in determining motive, proof of an unconstitutional motive is essential to all of these plaintiffs' new claims. Judicial inquiry into the motives of the decisionmaking body is unavoidable. In determining the motives of a government body alleged to have violated the neutrality principles of the First Amendment, the Supreme Court has said: "Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, as well as the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *City of Hialeah*, 508 U.S. at ---- - ----, 113 S. Ct. at 2230-31. The parties here have provided such evidence — evidence of the history of the dispute, the timing of the Building Authority's change in policy, and other circumstantial evidence that bears upon the reasons for the Building Authority's enactment of Rule 13, and contemporaneous records of the Building Authority's decisional process in the form of minutes from board meetings. In addition, they have provided evidence of the effects of the Building Authority's amended Rule 13 on private speech in the City-County Building. *See City of Hialeah*, at ----, 113 S. Ct. at 2228 ("Apart from the text, the effect of a law in its real operation is strong evidence of its object.").

The defendants also submitted testimony from depositions taken of Mr. Reinking and all the members of the Building Authority board. Some of the excerpts defendants submitted are essentially after-the-fact statements

by the decisionmakers offered to show that the board's motives at the time of enacting Rule 13 were not illicit. Other statements fill in details of board discussions not reflected in the summaries in the minutes. Plaintiffs objected to the admission of all these statements at the hearing on the ground that neither Indiana nor federal law permits them. After hearing argument on the point, the court overruled plaintiffs' objection and admitted defendants' proffered deposition excerpts along with similar excerpts which plaintiffs then offered in rebuttal (without waiving their objection).

Citing one line of Indiana cases, plaintiffs' argue that the official minutes of a government body like the Building Authority board of directors may not be supplemented by oral testimony from members to show the body's "intent." *See, e.g., Jones v. State of Indiana*, 240 Ind. 230, 236-37, 163 N.E.2d 605, 608 (1960); *Cundiff v. Schmitt Development Co.*, 649 N.E.2d 1063 (Ind. App. 1995); *Carter v. Allen*, 631 N.E.2d 503, 509 n. 4 (Ind. App. 1994). These cases establish that where state law requires a local government body to make a certain finding in writing or to take certain action on the record, members may not fill in gaps in the written record by testifying that they "intended" to make the required finding or to take the required action. The reasoning of these cases does not extend to forbid members accused of harboring some illicit motive from testifying about the *reasons* they took a certain action. Even if Indiana law governed the admissibility of the defendants' testimony, and it does not, this line of Indiana cases does not support plaintiffs' objections.

Plaintiffs also cite a line of Indiana and federal cases holding that a court may not consider testimony from individual legislators about their intentions when the court is trying to determine the legislature's intent to help the court construe an ambiguous statute. *See, e.g., O'Laughlin v.*

Barton, 582 N.E.2d 817, 821 (Ind. 1991); *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1438-39 (7th Cir. 1988) (explaining that statements of individual legislators after the fact are not reliable guides to the intentions of the legislative body at the time it enacted the legislation). This line of cases does not forbid consideration of evidence from individual legislators where subjective *motive* is the decisive constitutional issue.

Because of the obvious possibility that such after-the-fact statements made during litigation may not accurately reflect the decisionmaker's true motives, judges and juries need to treat them with caution. But treating such evidence with caution is different from refusing to consider it. Judges and juries consider such evidence from decisionmakers in many contexts. Examples include employment cases brought under the Equal Protection Clause, *e.g.*, *Auriemma v. Rice*, 910 F.2d 1449, 1455-56 (7th Cir. 1990) (en banc) (defendant decisionmaker testified as to his motive because defendants' motive crucial in Equal Protection challenge even in qualified immunity analysis), and retaliation cases involving prison officials, *e.g.*, *Harris v. Fleming*, 839 F.2d 1232, 1238 (7th Cir. 1988) (defendant prison guard relied on own affidavit denying retaliatory intent, but genuine issue of fact existed as to his motivation). There is also an element of basic fairness that should not be overlooked here. Where a decisionmaker's motives are called into question based on inferences drawn from circumstantial evidence, whether the defendant is an individual or a group decisionmaker, the defendant should normally be able to deny that he, she, or it had an illicit motive by testifying to that effect. Plaintiffs' objections here would require a defendant to stand silent in the face of serious accusations of acting for illicit motives. Moreover, plaintiffs are arguing for a one-way rule. They admit that if a plaintiff alleging an unconstitutional motive could obtain direct evidence of such a motive by admissions of a

decisionmaker, the plaintiff would be entitled to use such evidence. They argue that only a defendant accused of illicit motive is barred from testifying to deny that motive. That is not the law.

Of course, in cases where motive is the constitutional issue, more objective and contemporaneous evidence is likely to provide the better guidance about the decisionmaker's true motives. However, the Supreme Court has stated that in determining whether a law was enacted because of "invidious discriminatory purpose," "[i]n some extraordinary instances the members [of the decision-making body] might be called to the stand at trial to testify concerning the purpose of the official action...." *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 268, 97 S. Ct. 555, 565, 50 L. Ed. 2d 450 (1977). A number of other cases support the admissibility of the decisionmakers' testimony about their own motives. *See La Crosse County v. Gershman, Brickner & Bratton, Inc.*, 982 F.2d 1171, 1175 (7th Cir. 1993) (recognizing as "legally cognizable" the "difference between an individual legislator's testifying in explanation of his or her own motive for voting in a particular way and the same person's explanation of why a piece of legislation was enacted"); id. at 1177-78 (Fairchild, J. concurring); *United States v. Board of School Comm'rs of Indianapolis*, 637 F.2d 1101, 1108 n. 14 (7th Cir. 1980) (district court properly considered under Arlington Heights "evidence presented on the question of racial motivation, including the statements of a black legislator who testified that race was never considered in drafting the legislation at issue"); *Bonham v. District of Columbia Library Admin.*, 989 F.2d 1242, 1244 (D.C. Cir. 1993) (in analyzing purpose prong of Lemon Establishment Clause test, court could look to "testimony of parties who participated in the enactment or implementation of the challenged law or practice").

The preceding discussion is not to say that such after-the-fact statements must be given much weight. The potentially self-serving character is obvious. But treating such statements carefully and critically is a matter going to weight and not to admissibility. In any event, as the following discussion of the facts in this case shows, ultimately the court would not draw the inference that the Building Authority acted with an illicit motive in amending Rule 13 even if the specific deposition excerpts were excluded and the case were decided on only plaintiffs' designated evidence and the defendants' evidence to which no objection was made. The testimony of the board members was essentially consistent with the reasons for the defendants' actions as shown by circumstantial evidence and contemporaneous records in the case.

D. Findings of Fact

Against this legal background, the court will turn to a more detailed exposition of the facts relevant to the plaintiffs' likelihood of success on the merits of their claims for retaliation based on litigation and hidden viewpoint discrimination. There is substantial overlap between the facts relevant to these different theories.

1. Findings of Fact for Retaliation Claim

For many years the Building Authority has had a set of written "Rules and Regulations Governing the City-County Building and Grounds." Until October 2, 1995, Rule 13 of those rules provided:

> 13. USE OF COMMON AREAS. The common areas, such as the Public Assembly Room, meeting rooms, observatory and others as may be so designated, may be reserved for use by tenants or tenant sponsored activities. Use by outside and public groups prohibited.

Pl. Ex. 2. Mr. Reinking has testified and defendants have argued that this original version of Rule 13 applied to the lobby, so that private use, including displays like plaintiffs' menorah, were prohibited all along. However, as defendants conceded at the hearing, and as is evident from the record of past private uses of the lobby, the original Rule 13 was never applied so as to prohibit private use of the lobby.

Plaintiffs first sought permission to display their menorah in the City-County Building lobby in 1985. They were permitted to display the menorah each year from 1985 to 1992. Mr. Reinking consulted with legal counsel (at least in 1990, 1991, and 1992) and decided to allow this private use of the lobby because "we really didn't see any harm in doing that." Reinking Dep. at 140. *Cf. May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1117 (7th Cir. 1986) ("It would hardly occur to the average school administrator to think that when he allowed the girl scouts to use school premises he should be thinking what to do when the Ku Klux Klan asked to use these premises for its cookie sale...."). In 1992 the menorah display generated some controversy. The Indiana Civil Liberties Union (ICLU) objected to the display of the menorah under circumstances that might lead observers to conclude that the government endorsed the plaintiffs' religious message. The ICLU proposed that the Building Authority solve this problem by adopting a policy that would make the lobby an open public forum. Pl. Ex. 23 & 24. The Jewish Community Relations Council (JCRC) also objected to the display of the menorah on government property. The JCRC wrote that the display of religious symbols in the halls of government "gives the unavoidable message that government has placed its imprimatur on religion. At the very least, such a message is unwise." Pl. Ex. 31. The JCRC (correctly) cautioned that if the Building Authority declared the lobby a public forum, it would not be possible to discriminate among displays on the basis of content, and warned that the

"logical, and inevitable outcome of declaring a public forum is made clear by the experience of Cincinnati in which the KKK was permitted to erect a cross, on the basis of the same arguments used by Lubavitch of Cincinnati to erect its menorah." The JCRC argued that the Building Authority should not open the forum but should instead "develop a policy which does not permit religious displays within the City-County Building, so as to avoid the appearance of governmental endorsement of one religion over others."

The Building Authority did not adopt the ICLU's proposal of an open public forum in the lobby. Board minutes and the testimony of Mr. Reinking show that in 1992 and 1993, the Building Authority considered and explicitly rejected the idea of opening the forum because it would give up much of its control over uses of the lobby. Pl. Ex. 16; Reinking Dep. at 143, 148-49. However, the Building Authority adopted on October 4, 1993, its "Policy on Seasonal Displays," which the Court of Appeals later held unconstitutional. The records relating to the board's adoption of that policy show that the board was trying to deal with the "controversy" that the prior menorah displays had generated. The board's records indicate that the principal reason the board adopted the policy was to respond to the Establishment Clause concerns raised by both the ICLU and the JCRC. The board deliberately selected the policy option that would let it retain more control over the lobby while still accommodating at least some displays. See Pl. Ex. 16; Fox Dep. 57-59, 130-31; Hohmann Dep. 28, 36. Although this court and the Court of Appeals eventually concluded that a neutral policy allowing seasonal displays by private groups, including religious symbols, would not violate the Establishment Clause in this setting, the Building Authority's concerns about the Establishment Clause were not at all unreasonable. The opinions in a recent Supreme Court decision indicate that at least some members of the nation's highest court might well consider the Building

Authority's policy to have been *mandated* by the Establishment Clause. *Capitol Square Review and Advisory Bd. v. Pinette*, --- U.S. at ---- - ----, 115 S. Ct. at 2464-73 (Stevens, J., dissenting) (arguing that Establishment Clause prohibits display of religious symbols in traditional public forum at seat of government despite availability of neutral policy of equal access), and at ---- - ----, 115 S. Ct. at 2474-75 (Ginsburg, J., dissenting) (same).

After the Court of Appeals issued its order of November 29, 1994, prohibiting the Building Authority from enforcing the "Policy on Seasonal Displays," plaintiffs immediately set up their menorah display during Chanukah in 1994. The Building Authority put up a Christmas tree, as it has for many years. [2/] Other groups and individuals contacted the Building Authority seeking to put up related displays in the public lobby. One woman who said her religion was Wicca sought and received permission to display a sign with a pentacle (a five-pointed star in a circle) to celebrate the winter solstice. A minister sought and received permission to display a Christian cross in the lobby for a few days at Christmas. Another man sought and received permission to display signs protesting the display of religious symbols in the public building. The Building Authority granted permission for these displays in 1994 solely on the basis of the Court of Appeals' emergency order. Other groups and individuals contacted the Building Authority about similar displays but did not follow through. See Pl. Ex. 36 (request to display Nativity scene at Christmas); Pl. Ex. 38 (request to display sign reading "Jesus Christ Is A Myth; The Winter Solstice Is The Reason

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[2/] The government may "use its own property to send a non-religious holiday message without opening its property to messages by others." *Grossbaum*, 63 F.3d at 592 n. 12, explaining *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341 (7th Cir.1990).

for the Season."). These events attracted quite a bit of media attention.

During the time these various displays were up, Mr. Reinking heard a number of negative comments about the Wicca pentacle. The pentacle display was apparently stolen only an hour after it was put up. Mr. Reinking also heard negative comments about the cross that was displayed and about an event during which Rabbi Grossbaum brought a group of children into the lobby, "seemed to be conducting classes regarding the menorah and then led the children in some songs." Reinking Dep. at 162-63. He said that the hostile comments he heard about all of these religious displays were to the effect that these religious symbols should not be permitted in or were not appropriate for the building.

On August 15, 1995, the Court of Appeals issued its opinion holding that the Policy on Seasonal Displays violated plaintiffs' Free Speech rights. A copy of the opinion was sent to each director of the Building Authority before the board's September 5, 1995, meeting, and at the public meeting counsel reviewed with the board several litigation options. The board agreed to hold an executive session to consider these options in the next month. The board then discussed with its counsel Rules 13 and 14. The minutes state:

> It was observed that these original rules reflect the purpose served by the lobbies and corridors to provide unobstructed and safe ingress and egress to City and County government offices by employees and by the general public conducting business in the City-County Building. In this regard, the Board of Directors briefly discussed the effects that the new security measures at the

City-County Building will have on pedestrian traffic in the common areas.

Pl. Ex. 8.

On October 2, 1995, the board held an executive session at which it considered this litigation. The board then met in public session. Among the matters considered was a proposal to: (1) revise Rule 13 to prohibit all private groups from displaying signs or other structures in the common areas, including the lobby; (2) revise Rule 14 to clarify which common areas are subject to its prohibition on political uses; and (3) rescind the Policy on Seasonal Displays. The minutes concerning these discussions provide as follows:

The Directors reviewed rules 13 and 14 of the Rules and Regulations Governing the City-County Building. Legal counsel explained that these Rules and Regulations were adopted by the Authority pursuant to provisions contained in the City-County Building Lease dated August 3, 1959 between the Authority, the City of Indianapolis, and Marion County. In conjunction with a review of these two rules, the Directors also considered its policy on religious displays and symbols adopted on October 4, 1993. Copies of the two rules and the policy had been furnished to the Directors prior to the meeting.

The rules and the policy under review concern the use of the common areas of the City-County Building. Legal counsel explained that the common areas in the building are those public areas not leased to the City and County which include lobbies, corridors, the Public Assembly Room, Observatory, and other meeting areas. The purpose served by the lobbies and corridors is to provide unobstructed and safe ingress and egress to the City and County government offices by employees and by the general public conducting business with government offices and courts.

Rule 13 restricted the use of the common areas to tenants or tenant-sponsored activities. The rule prohibited use of the common areas by outside groups. Legal counsel explained that from the opening of the City-County Building in 1962, rule 13 banned non-governmental, private groups from erecting displays and structures in the common areas. In recent years, however, certain private groups were permitted to erect displays and structures in the common areas, notwithstanding the prohibition in rule 13. The problem with private displays and structures is the need for the Authority to provide unobstructed and safe ingress and egress to government offices. Certain private displays and structures can create controversy, disruption, and hostility. This causes a concern for security, public safety and pedestrian control in the lobby and corridors. In one instance, a private display caused sufficient hostility that it was stolen within one hour after its erection. The lobby of the City-County Building experiences an exceptionally high flow of daily people traffic for an office building. The area in the lobby around the Tower elevators has always been congested with traffic due to the under-elevatored condition of the building. In addition, access to and from the City-County Building will be impeded and space in the lobbies will become more limited with the new security measures approved by the City-County Council in June, 1995. A walk-through metal detector and an x-ray scan conveyor are to be installed in the lobby at the Court Wing elevators and access to the Court Wing from the Tower will be restricted. One of the effects of the new security measures will be an increased flow of traffic through the Tower lobby.

Rule 14 prohibits the use of the common areas for political activities and the display of political signs. Legal counsel explained that this rule has from its inception always been strictly enforced by the Authority.

The recommendation by legal counsel to the Board of Directors is that (i) rules 13 and 14 be restated to read in the form distributed to the Directors, (ii) the policy on religious displays and symbols adopted on October 4, 1993 be rescinded, and (iii) the General Manager be instructed to strictly enforce and adhere to restated rules 13 and 14.

The Directors reaffirmed that the Authority is responsible for assuring unobstructed and safe access by employees and the general public to the government offices and courts housed in the building. The Directors observed that over the past two years, new proposals for security measures for the City-County Building have been extensively reviewed and discussed including their impact on pedestrian traffic flow and ready-access by the public to the building. From time to time, the Authority has been asked by the City administration to find ways to improve the flow of traffic and the accessibility of government offices to the general public. The Directors agreed that the new security measures with the installation of metal detectors and x-ray scanners will slow the flow of traffic in the City-County Building and will to some degree increase the flow of traffic in the lobby of the Tower. The Directors also acknowledged that the under-elevatored condition of the building has placed a burden on moving people traffic in the lobby of the City-County Building. The Directors agreed that private displays and structures may impede the flow of traffic and may create a public safety risk. This is especially true with respect to private displays and structures which are prone to controversy, disruption and hostility. The Directors concluded that for these reasons, the use of the common areas of the building should be restricted to the Authority and to City and County tenants. Upon motion duly made and seconded, the Board of Directors unanimously approved the following resolutions:

RESOLVED, that rules 13 and 14 of the Rules and Regulations Governing the City-County Building be amended and restated to read as follows:

Rule 13. USE OF THE COMMON AREAS.

Use of the common areas of the City-County Building including lobbies, corridors, the Public Assembly Room, Observatory, and other meeting rooms (generally those public areas not leased to governmental tenants) is restricted to the Building Authority and its governmental tenants. No displays, signs or other structures shall be erected in the common areas by any non-governmental, private group or individual since such objects may interfere with unobstructed and safe ingress and egress by employees of the governmental tenants and by the general public conducting business with government offices and courts in the City-County Building.

Rule 14. USE OF COMMON AREAS FOR POLITICAL ACTIVITIES. Use of the common areas of the City-County Building (generally those public areas not leased to governmental tenants) for political activities is prohibited. No political signs, pictures or other materials shall be posted or displayed in the common areas.

RESOLVED, FURTHER, that the policy on religious displays and symbols adopted by the Board of Directors at its October 4, 1993 meeting be, and it hereby is, rescinded effective immediately.

RESOLVED, FURTHER, that the General Manager be, and he hereby is, instructed to

> strictly enforce and adhere to rules 13 and 14 as amended, restated and adopted.
>
> Upon motion duly made and seconded, the Board of Directors unanimously approved the following resolution:
>
> RESOLVED, that legal counsel for the Authority is hereby instructed not to appeal the decision by the United States Court of Appeals to the United States Supreme Court by filing a petition for *writ of certiorari*.

Pl. Ex. 9.

As is often true in retaliation cases, plaintiffs have not offered any direct evidence showing that the Building Authority acted to retaliate against plaintiffs for filing the lawsuit. Instead, plaintiffs argue that circumstantial evidence should lead the court to infer that the board acted for that purpose. Plaintiffs base their factual argument on (a) the timing of the Building Authority's action; (b) the manner in which the Building Authority adopted the revised rule; and (c) plaintiffs' contentions that the Building Authority's proffered reasons for the new rule are pretexts and not worthy of credence. The Building Authority argues that it revised Rule 13 as a way of dealing with expected pedestrian traffic problems resulting from new security measures to be instituted in the near future in the City-County Building. The Building Authority was also concerned about the controversy and hostility generated by the activity in December 1994, and about what it perceived as a loss of its ability to control the lobby.

Timing: The Building Authority took up the matter of revising Rule 13 immediately after the Court of Appeals issued its decision on August 15, 1995, raising the issue at its next meeting and passing the resolution at its second meeting after that decision. However, the scope of the forum was an issue the Building Authority had considered

before. Mr. Reinking testified in his deposition that in early 1993, he asked counsel to review the rules and regulations and to prepare "a larger scale" policy that would help the authority control the number and type of displays that are in the building. Reinking Dep. at 143. At that time, the board and management of the Building Authority did not want to open up the lobby as a public forum, but the only step they took to restrict access was to adopt the Policy on Seasonal Displays, which dealt with the most immediate problem they had faced. See Reinking Dep. at 143, 149; Fox Dep. at 57-59; Hohmann Dep. at 28, 36. The events of December 1994 obviously raised these concerns again, but the Building Authority board and management did not take action while the appeal was pending in the Court of Appeals. There is no evidence of any new controversy concerning access during that interim, after the 1994 holiday season came to a close.

In June 1995, the City-County Council appropriated funds to upgrade security for at least the courts wing of the City-County Building. The plan calls for installation of a magnetometer on the ground floor of the west wing of the building, where a number of courts are located. All persons going into that wing will be required to pass through the magnetometer. In addition, access between the west wing and the center tower of the building will be blocked off above the first floor. As a result, many people who customarily go through the west wing to avoid the already crowded center tower elevators will be forced to use the center tower elevators again. Mr. Reinking also received information indicating that the volume of traffic and the slow pace of the screening procedure were likely to create lines of people stretching back into the main lobby as they waited to pass through the magnetometer. See generally Reinking Dep. at 248-50.

Mr. Reinking testified that in May and June 1995, he was working with legal counsel to formulate a more "global"

policy regarding displays in the common areas of the building. He and counsel planned at that time to propose a new policy that would be much more restrictive, limiting access to only governmental tenants, regardless of the outcome of the appeal. Reinking Dep. at 210-11. In fact, Mr. Reinking was actually denying a few requests for displays on the basis of this proposed policy. *Id.* However, he testified that counsel had advised him to delay acting on any new policy until the Court of Appeals ruled because a revision "might appear to them that we were trying to make an end run around their ruling, to do something that would diminish the effect of their ruling." Reinking Dep. at 212.

Plaintiffs point out correctly that the pending appeal posed no *legal* obstacle to the Building Authority's power to revise its rules. They argue that if the Building Authority had really wanted to restrict access based on any of its asserted reasons, it would have acted sooner. Because the delay was not necessary, plaintiffs would have the court infer that the asserted reasons for the board's action were pretexts and that the ultimate decision was intended to retaliate against and punish plaintiffs. The court does not find that that inference is warranted. Although there was no legal impediment to revising the rules while the appeal was pending, the court finds nothing suspicious or sinister in the decision to delay action until the Court of Appeals ruled. The Building Authority and its counsel could reasonably choose, especially in the absence of a pressing emergency, not to complicate the appeal by rewriting the rules, having the parties give the Court of Appeals notice of the change, and perhaps argue about the change, all after the appeal had been submitted but before it was decided. Whether counsel and the Building Authority correctly gauged the possible reaction of the Court of Appeals to such developments or whether others might reasonably have taken action sooner does not matter here. At a minimum, the Building Authority did not act so unreasonably in delaying action that the court

should infer that the Building Authority's asserted reasons for acting were pretexts for an unconstitutional retaliatory motive.

Manner: Plaintiffs point to a number of facts concerning the Building Authority's revision of its policy which, they say, further support an inference of retaliatory or discriminatory intent. Rabbi Grossbaum wrote to Mr. Reinking on August 28, 1995, requesting permission to display the menorah during Chanukah in December 1995. Pl. Ex. 43. Mr. Reinking did not reply to that letter until October 3, 1995, the day after the board revised Rule 13. Pl. Ex. 49. Neither the Building Authority nor its counsel notified plaintiffs that a revision to Rule 13 was being considered or proposed. Plaintiffs also point out that when Stephen Schroeder, the man who had displayed the signs protesting religious symbol displays in 1994, wrote to Mr. Reinking requesting permission to display his signs again in 1995, Mr. Reinking responded promptly and informed Mr. Schroeder that the Building Authority was "reviewing with its legal counsel the options available to the Authority in response to the decision" of the Court of Appeals. He said the Building Authority was "not considering requests for displays" until those options had been explained to the directors. Pl. Ex. 44 & 45.

Mr. Reinking did not tell Mr. Schroeder that the Building Authority was considering amending its rules of access, nor did he tell Mr. Schroeder anything that Rabbi Grossbaum and his counsel could not have surmised. The Building Authority complied with Indiana's open door law in revising its policies and was not required to give plaintiffs or their counsel any individual notice of the meeting or the proposed revision of the rules. The court draws no inference of retaliatory or discriminatory intent from the defendants' failure to keep plaintiffs informed about their thoughts and plans.

Plaintiffs have reviewed the available written records concerning the board's actions and have deposed Mr. Reinking, his assistant, and all five board members. Plaintiffs have not identified any evidence directly indicating any hostility or retaliatory animus directed at plaintiffs. In fact, the board members testified they were not aware of Rabbi Grossbaum's request to display the menorah in 1995 when they acted to revise Rule 13. From this absence of such evidence and the fact that litigation counsel also prepared the board's minutes, plaintiffs would have the court infer that the defendants had a retaliatory and/or discriminatory motive but made a conscious decision to keep the record "clean." [3/]

The board members who were deposed testified that the plaintiffs' menorah was not mentioned in their discussion of the proposed revision to Rule 13. Plaintiffs argue that that testimony should not be believed because it is inherently incredible that the directors would not have talked about the specific situation that triggered the controversy. They also assert that Mr. Reinking contradicted the directors' testimony. In the deposition, counsel called Mr. Reinking's attention to the passages in the October 2, 1995, minutes mentioning that "certain private displays" can create or are prone to "controversy, disruption, and hostility." The transcript reads:

[3/] Plaintiffs' argument on this point has an obvious element of "Heads I win, tails you lose." Plaintiffs seize on every direct or indirect mention of their menorah to support their motive arguments, yet they also say that the absence of more such mentions also supports their arguments. This form of argument suggests that the more objective evidence, which tends to be less vulnerable to the possibilities of either convenient memories or argument by speculation, provides a more solid foundation for the court's findings on the defendants' motives.

Q: [W]hat were the displays that were discussed in connection with those entries?

A: As I recall, that part of the discussion talked about the displays during, basically, the month of December of 1994 and, I guess, the commotion or whatever that was caused by these displays being in the building.

Q: Those displays, just so we're on the same page, were the menorah, the pentacle for the hour that it was there, the cross, and Mr. Schroeder's poster display?

A: Yes, I believe those were the primary items that were talked about in that area.

Reinking Dep. at 240. From these different accounts of the meeting, the court finds that, as reflected in the minutes, the board discussed the controversy and "commotion" caused by all the displays, but there is no evidence they singled out plaintiffs and their menorah for special attention. [4/]

As the court noted last year, and as remains true today, the evidence does not indicate that the defendants have ever had any hostility or religious-based animus against the plaintiffs. Such animus is a theoretical possibility, but the evidence simply does not support the claim here. Plaintiffs' arguments to the effect that the board must have talked about them and their menorah, and that the absence of such evidence must reflect a conspiracy of silence, exaggerate the plaintiffs' significance to the defendants. The

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[4/] Both parties chose to present deposition testimony instead of calling witnesses to testify at the preliminary injunction hearing. Plaintiffs have asked the court to find some of that testimony not credible. The court does not find the testimony not credible on the basis of merely a paper record, but, as discussed above, bases its findings primarily on more objective and contemporaneous evidence of the defendants' motives.

evidence shows that the Building Authority permitted plaintiffs to display their menorah for eight years. After the ICLU and JCRC objected in 1992, the Building Authority reconsidered its position, and did so with a bigger picture in mind than the plaintiffs and their menorah, including its ability to maintain control of its property. When it considered the revisions to Rule 13 in October 1995, the Building Authority board was obviously aware of plaintiffs' menorah and the other religious displays that had been up during 1994. But the evidence shows the board was not focusing solely on those particular displays or their sponsors. The board, having learned firsthand about the difficulties of managing any type of forum open to the public consistent with the First Amendment, was considering the broader perspective of how to keep the desired degree of control over the lobby and other public areas. The absence of specific discussion aimed at plaintiffs is not suspicious. It merely indicates that the board was basing its decision on matters that were more general and more important than the particular request that had raised the issue. In view of the law of nonpublic forums, limited public forums, and public forums, that is entirely appropriate. In short, the manner in which defendants amended Rule 13 does not tend to show a retaliatory motive.

The Defendants' Asserted Reasons: Plaintiffs argue that the reasons asserted by the Building Authority for revising Rule 13 have no real substance and are merely a pretext for unconstitutional motives. As noted above, the Building Authority minutes reflect concern about the effects that unrestricted access to the lobby for private displays could have on pedestrian traffic in the building, especially as new security measures are instituted. The board was also concerned about the controversy and hostility generated by some private displays, including the various displays that were set up during the 1994 holiday season. More generally, the record as a whole shows that since the issue

of private displays first arose, the board has been concerned about its ability as owner and manager of the property to maintain control over access to the lobby.

Plaintiffs have presented evidence showing that the City-County Building experiences security problems that are more serious than any difficulties experienced thus far with private displays in the lobby. (For example, the building receives bomb threats fairly frequently, and must often deal with disorderly and/or intoxicated persons, and persons with weapons. See Pl. Ex. 32, 33, & 34. In one year, thousands of knives and 191 guns were confiscated at a metal detector outside the domestic violence courtroom. Def. Ex. 12.) The holiday season displays last year generated "hostility" and controversy, but no physical disturbances such as fistfights or other altercations. The disappearance of the pentacle display has been attributed to theft. It is not unreasonable to attribute that incident to the hostility and controversy surrounding the displays. Nor is it unreasonable to expect that if the forum remains open to private displays, some future displays will generate substantially more controversy and hostility. See Capitol Square Review and Advisory Bd. v. Pinette, --- U.S. at ---- & n. 2, 115 S. Ct. at 2465 & n. 2 (Stevens, J., dissenting) (display of menorah in public forum prompted request by Ku Klux Klan to display cross, followed by vandalism, protests, and requests to display many more crosses to express opposition to KKK).

Defendants do not argue that the new Rule 13 is necessary to make the lobby a physically safe place. They argue that if the lobby remains a forum open for private displays, including some displays likely to generate controversy, hostility, and crowds, the lobby will become significantly more crowded. At the same time, say the defendants, the lobby is already crowded, and they reasonably expect the lobby to become significantly more congested as new security screening measures are

implemented. Defendants argue that closing the forum to all private displays is a reasonable step to deal with these expected problems.

The parties have submitted a significant quantity of evidence concerning security problems and the plans for upgrading security in the City-County Building. That evidence shows that the government tenants and the Building Authority have been considering and debating for a number of years various proposals to enhance security. The Building Authority has favored proposals that would require all visitors to any part of the building to go through a magnetometer to search for weapons, and possibly to have parcels, purses, and briefcases X-rayed for weapons or explosives. Others have objected to such screening for all visitors and have proposed security procedures only for those persons entering the parts of the building where courts are located. The evidence shows that in June 1995, the City-County Council appropriated funds for security screening of persons entering the west wing of the building, where many (but not all) courts are located. That proposal is expected to be implemented soon (when the necessary equipment arrives), but it had not been implemented yet when the Building Authority voted to revise Rule 13 to limit private displays in the lobby. Because of the location of the new security screening devices, the existing volume of pedestrian traffic into the west wing, the existing volume of pedestrian traffic in the center tower lobby, and the expected increase in lobby traffic when passages between the center tower and the west wing are blocked above the first floor, the new plan is likely to cause more serious pedestrian congestion in the lobby of the center tower of the building. [5/]

[5/] This material is set forth in detail in the depositions of Mr. Reinking and, to a lesser degree, Mr. Fox.

In general terms, these are the matters the board referred to in its minutes of September 5, 1995, concerning "the effects that the new security measures at the City-County Building will have on pedestrian traffic in the common areas," Pl. Ex. 8, and in more detail in the minutes of October 2, 1995, when the board revised Rule 13 to prohibit private displays in the lobby. Plaintiffs contend that these concerns are pretexts for the revision of Rule 13, pretexts for unconstitutional motives of retaliation and discrimination against plaintiffs' views. Plaintiffs point out that until the Court of Appeals ruled last August, there was never any discussion linking Rule 13 or lobby displays to security plans or pedestrian traffic concerns. They contend that the private displays in the lobby are already relegated to an out-of-the-way spot behind the main staircase in the center tower, and that even that area is some 60 to 80 feet from the planned location of the magnetometer in the west wing. Plaintiffs also point out that Rule 13 imposes no restrictions on lobby displays by government tenants in the building, and that such displays could interfere with traffic flow or pose security concerns much more troublesome than private displays, like theirs, which are now prohibited by Rule 13. Plaintiffs argue that if the board's concerns about traffic flow and security were in fact legitimate, the board would have adopted rules that would have applied to lobby displays by government tenants of the building. In addition, they suggest, the more reasonable way to address the congestion problems would be "time, place, and manner" restrictions that would be neutral as to content and the identity of the speaker.

The court finds that the defendants' concerns about increased traffic flow and congestion in an already-crowded lobby are legitimate and sincere, not pretexts hiding some other motivation for the revision to Rule 13. First, the City-County Council's appropriation in June 1995 was a sufficiently concrete step toward implementing the new

security plan that defendants' concerns are not speculative. Second, the Building Authority cannot predict precisely how serious the increase in congestion will be when the new security procedures are implemented, but it has reasonable grounds for expecting that increase to be significant. It would be irresponsible for the Building Authority not to consider other steps it could take to reduce other sources of congestion. Displays that either physically block or alter pedestrian flows, or that cause groups of people to gather in the lobby are certainly not the greatest threat, but the defendants' concerns are not unreasonable. Third, the timing of the defendants' concerns linking private displays to the new security plans and traffic flow problems is not as suspicious as plaintiffs suggest. The defendants were considering the linkage long before the Court of Appeals ruled in August. As noted above, it was not unreasonable for them to wait until the Court of Appeals ruled before taking action. Fourth, the Building Authority could reasonably view the displays that followed from the litigation last year as only a hint of the requests and displays that it could expect in future years, particularly if groups with far more controversial messages were to request access to the lobby. These scenarios might not have been laid out in painful detail in considering the amendment to Rule 13, but Mr. Reinking and the board had been learning about public forum law at least since late 1992. "[T]he Government need not wait until havoc is wreaked to restrict access to a nonpublic forum." *Cornelius*, 473 U.S. at 810, 105 S. Ct. at 3453.

The plaintiffs' arguments based on the lack of regulation of displays sponsored by government tenants or the alternative of time, place, and manner restrictions do not support a finding that the defendants' asserted reasons are pretexts. In a series of hypothetical questions to Mr. Reinking, plaintiffs showed that the Building Authority's rules do not contain limitations as to size, duration, or

frequency of such displays. They also showed that the rules do not authorize the Building Authority to refuse especially controversial displays by tenants. For example, plaintiffs hypothesized government displays featuring the speeches of Minister Louis Farrakhan or an explicit "safe sex" display for government employees as part of an AIDS awareness program.

Plaintiffs are correct that the written rules in place would not apply to restrict displays by the governmental tenants. However, Mr. Reinking testified that as the person in charge of making such decisions, he would act to restrict some displays by governmental tenants:

> Q: Regardless of who placed that display, a display that creates controversy could create confrontations between people and lead to a security concern; is that right?
>
> A: [I]t's certainly my understanding of the intended application of our policy that we would not permit our tenants to place items that we thought were going to create controversy or confrontation. We would ask them it they have to display something like that, to use their own space....
>
> * * * * * *
>
> Q: There is no limitation in the policy, though on the number of displays that a tenant can request to place in the lobby?
>
> A: No, that would be something that the authority would have to administer. And it we felt that an agency was asking for a number of displays or size of displays, whatever, that disrupt traffic in and out of the building, then

we would tell them so. And we would probably deny their requests.

Q: That denial would not be based on any of the existing rules that are set forth in the rules and regulations of the Building Authority, right?

A: I think we would refer to Rule 13 and its emphasis on traffic, safe ingress and egress and apply that same logic to the tenants if their requests were too numerous.

Reinking Dep. at 245-46, 247-48.

This testimony indicates that the Building Authority has been concerned about the potential effects of controversial displays generally, not just controversial private displays. However, the Building Authority has tools available to deal with tenants that are not available in dealing with private persons. To the extent the Building Authority opens the lobby for expressive activity by private persons, it is subject to the First Amendment. Viewpoint discrimination is prohibited, and attempts to limit displays based on "subject matter" are likely to embroil the Building Authority in more controversy and litigation, especially in the view of the inherent difficulty in drawing a line between prohibited "viewpoint" discrimination and the sometimes permissible "subject matter" discrimination. *See, e.g., Air Line Pilots Ass'n*, 45 F.3d at 1159 (noting problem of avoiding "viewpoint inquiry by retreating to an exaggerated level of generality"). Time, place, and manner restrictions would remain available to the Building Authority, of course, but those would have to be spelled out in considerable detail, and could reasonably be expected to require a significant investment of management's time (and taxpayer cash for legal fees) to administer fairly and constitutionally. In a nonpublic forum, a broad formal prohibition on private displays therefore is a permissible and understandable way

to restrict access to avoid dealing with especially controversial displays.

The Building Authority's relationship with its tenants is very different. The plaintiffs have not cited any authority suggesting that the government agency tenants of the Building Authority could sue under the First Amendment if the Building Authority denied a request for a lobby display based on any reason, even if that reason were not spelled out in the Building Authority's rules. The Building Authority is in a position to "jawbone" tenants who wanted to put up a display that would cause any sort of problem for the Building Authority, whether by reason of size, duration, or even controversial content. Unlike private persons, who are entitled, and can reasonably be expected, to try to push their First Amendment rights to their outermost boundaries in a public forum or a nonpublic forum, it appears that the government tenants do not have such rights, and the Building Authority can protect its interests without a detailed set of rules. *See Serra v. U.S. General Services Admin.*, 847 F.2d 1045, 1048 (2d Cir. 1988) (Free Speech clause does not preclude the government from controlling its own expression or that of its agents) (citing *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 n. 7, 93 S. Ct. 2080, 2105 n. 7, 36 L. Ed. 2d 772 (1973) (Stewart, J., concurring)); accord, *Rosenberger*, --- U.S. at ---- - ----, 115 S. Ct. at 2518-19 (state university free to restrict speech of its own agents). As Mr. Fox testified, the building manager can use reason with government tenants and is expected to use his judgment in dealing with them. Fox Dep. at 103-04; 113-14; 43-45. See also Reinking Dep. at 245-46, 248; 260-64.

Because of the different relationship the Building Authority has with its tenants, plaintiffs' pretext argument based on the failure to impose more restrictions on tenants' displays fails. Similarly, although the Building Authority

could have chosen to address these concerns with time, place, and manner restrictions, its preference as a property manager to maximize its control over its property and to avoid having to administer a neutral time, place, and manner regime is both understandable and constitutional. In sum, the court finds that the defendants' considerations of traffic and security-related matters in revising Rule 13 are not pretexts for some other motive. The traffic and security-related considerations are not necessarily compelling reasons for the Building Authority's action, nor are they the only reasons for its action. However, the court finds that these matters were in fact part of the Building Authority's honest reasons for revising Rule 13 to prohibit private displays.

In addition to the traffic and security-related concerns, a fair reading of the record also shows that the Building Authority based its decision on a desire as a property owner and manager to maintain control of its property and to avoid the controversy and complexities that face an owner of a nonpublic forum. Plaintiffs argue that this desire to avoid controversy is merely a pretext for other illicit motives. *Cornelius* makes clear that an owner of a nonpublic forum may restrict access or even close the forum in order to avoid controversy. 473 U.S. at 810, 811-12, 105 S. Ct. at 3453, 3454; accord, *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d at 1109. At the same time, the court must consider carefully the possibility that a professed desire to avoid controversy is in fact only a pretext for suppressing particular viewpoints. *Cornelius*, 473 U.S. at 812-13, 105 S. Ct. at 3454-55.

The Building Authority's primary purpose is to manage the building so that the work of the government offices and agencies housed there may be carried out. Managing a nonpublic forum is a complicated task, and one that can both distract from the primary mission and become

very expensive, even when handled absolutely correctly. After the controversy over the menorah began to develop as the ICLU and JCRC objected to the menorah display in 1992, the Building Authority rejected the ICLU's proposal for an open public forum in the lobby. Pl. Ex. 14, 23-25, 31. In December 1993, the board discussed the issue again and "agreed that no display or act should be permitted in the lobby of the City-County Building which would cause the lobby to be declared a 'public forum.' " Pl. Ex. 16. The board reiterated this view in its meeting of December 6, 1994. Pl. Ex. 17. In addition, Mr. Reinking testified in his deposition that this litigation had cost the Building Authority approximately $100,000 up to that time. He acknowledged that there were things other than litigation that he would rather spend his time doing to manage the building.

As the Building Authority argued at the hearing, the experience of December 1994 indicated that the Building Authority had lost some of its ability to manage the forum. The Building Authority minutes expressly reflect concern about controversy and hostility generated by some private displays, including the various religious and anti-religious holiday displays in 1994. As plaintiffs point out, the evidence does not reflect any fistfights or other physical disturbances or even demonstrations during the 1994 holiday season. However, the Supreme Court has made it clear that such proof of past disturbances is not required to justify denial of access to a nonpublic forum on grounds that the proposed use may disrupt the property's intended function. *Perry Educ. Ass'n*, 460 U.S. at 52 n. 12, 103 S. Ct. at 959 n. 12. As the Court put it in *Cornelius*, "the Government need not wait until havoc is wreaked to restrict access to a nonpublic forum." 473 U.S. at 810, 105 S. Ct. at 3453.

These concerns of the defendants are not objectively unreasonable such that they should be deemed a pretext. A manager of public property who opens up the property for

public use must be prepared to manage some difficult issues and can expect litigation, expense, and awards of opposing counsel's fees if he or she errs. A number of recent cases around the country deal with displays of menorahs and crosses in traditional public forums in contexts where the potential for controversy and at least the risk of violence is clear. *See generally Capitol Square Review and Advisory Board v. Pinette*, --- U.S. at ----, 115 S. Ct. at 2445 (noting sequence of symbols displayed and collecting cases). In the context of a nonpublic forum, moreover, where the Supreme Court says the manager may restrict access based on "subject matter," the Court has acknowledged that the distinction between permissible "subject matter" discrimination and prohibited "viewpoint" discrimination is "not a precise one." *Rosenberger*, --- U.S. at ----, 115 S. Ct. at 2517; accord, *id.* at ---- - ----, 115 S. Ct. at 2550-51 (Souter, J., dissenting) ("If this amounts to viewpoint discrimination, the Court has all but eviscerated the line between viewpoint and content"; majority's holding is "significant reformulation of our viewpoint discrimination precedents and will significantly expand access to limited-access forums."). See also *Air Line Pilots Ass'n*, 45 F.3d at 1159-60 (showing difficulty in distinguishing between viewpoint discrimination and restrictions on "categories" of speech, such as "political" or "commercial" speech). Under these circumstances, it is not unreasonable for managers of public property to retreat to the safest harbor they can find, which is to close the forum, as these defendants have done. These defendants' obvious desire to avoid controversy and to focus their energy and resources on their primary mission rather than umpiring access to a nonpublic forum is a constitutional motivation and not a pretext for any illicit motive here.

In sum, upon careful analysis, the facts here do not show that the defendants closed the forum in order to retaliate against these plaintiffs for exercising their constitutional rights to seek relief from the courts. The

Building Authority imposed a facially neutral and constitutional policy for legitimate and constitutional purposes.

2. Findings on Claim of Viewpoint Discrimination

To support their claim of hidden "viewpoint" discrimination and the closely related claim of retaliation against plaintiffs' viewpoint, plaintiffs rely on much the same evidence as for their claim for retaliation for litigation. The foregoing discussion finding that the defendants' asserted reasons for closing the forum are legitimate and not pretexts applies to the "viewpoint" claims as well. As discussed above, there is also no direct evidence of hostility toward these plaintiffs' religious views. However, plaintiffs argue that some testimony from the Building Authority directors provides direct evidence of hostility to religion in general. Board members testified that the board intended to prohibit all religious uses of the City-County Building when they adopted the Policy on Seasonal Displays in 1993. Fox Dep. at 71-73; Hokanson Dep. at 28-29; Hohmann Dep. at 51-52. Board minutes also reflect that intention. Pl. Ex. 16. These board members were then asked in depositions whether it was still the board's intention to prohibit all religious use of the building, and they said it was. These answers do not show that the board was hostile to religion and amended Rule 13 *because* it would prohibit religious uses. The record clearly shows that the 1993 Policy on Seasonal Displays was adopted for the purpose of resolving legitimate concerns about the Establishment Clause, not because the board was hostile to religion. Thus, there was no unconstitutional motive in the adoption of the Policy on Seasonal Displays. Nor do the comments that it is "still" the board's intention to bar all religious uses of the building show an unconstitutional motive in 1995. Amended Rule 13 has the effect of prohibiting all religious use of the building's public areas, and the board obviously "intended" that effect.

However, it amended the rule in order to serve other purposes by removing all private uses from the public areas. The testimony that plaintiffs cite does not show an unconstitutional motivation to suppress religious speech.

As the Supreme Court said in *Church of Lukumi Babalu Aye v. City of Hialeah*: "Apart from the text, the effect of a law in its real operation is strong evidence of its real object." 508 U.S. at ----, 113 S. Ct. at 2228. The same principle applies to the Building Authority's new rule in deciding whether its object was viewpoint discrimination. The new rule is sweeping. It closes the forum to all private expressive activities regardless of viewpoint or subject matter. The parties submitted evidence last year showing more than one hundred recent uses of the lobby. *Grossbaum*, 63 F.3d at 582 & n. 2. A substantial majority of those uses would be prohibited under the Building Authority's new Rule 13. Most important, there is no evidence here of what the Supreme Court has called "religious gerrymanders." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. at ----, 113 S. Ct. at 2227 (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696, 90 S. Ct. 1409, 1425-26, 25 L. Ed. 2d 697 (1970) (Harlan, J., concurring)). There is no evidence here that the defendants have tried to finesse definitions or exceptions to a rule so that plaintiffs' and others' religious displays would be prohibited while other, more favored subjects or viewpoints are permitted. Accordingly, this case is not like *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1166-67 (6th Cir. 1993), where the city undermined and evaded a facially neutral ordinance regulating private displays by arranging for public sponsorship of what had

previously been private displays that were more to the city's liking. [6]

The sweeping prohibition on all private uses for any subject matter also distinguishes this case from the facts alleged in *Air Line Pilots Ass'n v. Dept. of Aviation*, where the management of O'Hare Airport in Chicago prohibited advertising displays that were critical of a major airline. The government did not close the forum, as the Building Authority did here, but engaged in viewpoint-specific discrimination. 45 F.3d at 1159-60. Perhaps if the Building Authority had imposed narrower restrictions on access, so that only a few uses beyond plaintiffs' menorah display and a few other religious symbols were banned, plaintiffs' claim of viewpoint discrimination might be more plausible. But if we are to find the object in the effect, the effect of Rule 13 is to close the forum, to get the defendants out of the sometimes difficult and expensive business of managing the forum, and to concentrate on defendants' primary mission. Rule 13 is not a guise for viewpoint discrimination. [7]

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[6] Many past uses of the City-County Building lobby involved similar "sponsorship" of private activities by government tenants. Mr. Reinking and Mr. Fox testified that the Building Authority does not intend to permit such uses. See Reinking Dep. 66, 86; Fox Dep. 82-83; 138-39. The objective evidence of their conduct is consistent with that approach. See Pl. Ex. 42; see also Pl. Exs. 40, 41. If the actual practice of the Building Authority were to change, some of the questions concerning defendants' motivations here might require a fresh look.

[7] The court also rejects plaintiffs' claim that the Building Authority acted as the "handmaiden" of the ICLU and JCRC in suppressing speech they found objectionable. *Cf. Air Line Pilots Ass'n*, 45 F.3d at 1157-58. The Building Authority does not become the agent of everyone it listens to or eventually agrees with. It made its own judgments for legitimate reasons, and unlike the defendant's actions

(continued...)

Plaintiffs have not proved a reasonable likelihood of prevailing on their claims that the defendants changed their rules for any unconstitutional motive. The decision to close the forum to all private displays was facially neutral. Defendants have offered and supported their legitimate reasons for that decision. Plaintiffs have not shown they are likely to prevail in proving that those reasons were pretextual. While the defendants' decision was in part a *response* to this litigation, the decision remedied the constitutional violation and was not motivated by any desire to punish plaintiffs or to get even with them for filing suit. Nor was the decision to prohibit all private displays on any subject a mask for a desire to prohibit the expression of these plaintiffs' or others' religious beliefs.

IV. Balance of Harms

At the preliminary injunction stage, the moving party does not need to prove his case beyond dispute. If the balance of harms is lopsided enough, he may not even need to prove he is more likely to prevail than not. In fact, the Seventh Circuit has said that "[i]f the harm to the plaintiff from denial of the preliminary injunction would be very great and the harm to the defendant from granting it very small, then the injunction should be granted even if the defendant has a better chance of prevailing on the merits than the plaintiff, provided the plaintiff's chances are better than negligible; and vice versa." *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 123 (7th Cir. 1982). Accord, *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 387-88 (7th Cir. 1984).

7/ (...continued)
in *Air Line Pilots Ass'n*, the Building Authority's broad policy cannot be characterized as viewpoint discrimination.

This is not a case where the harm to plaintiff by the constitutional injury is so great that the prospect justifies an injunction upon a slight showing of likelihood of success on the merits. While it is uniformly held that the loss of free speech rights constitutes irreparable harm, the harm caused by such injuries is not always of the same severity. Here, plaintiffs face the loss of asserted free speech rights, and time is of the essence for their expression to have its intended effect. However, if an injunction is erroneously denied, the lobby of the City-County Building is by no means the only channel for plaintiffs' communication of their views. This fact does not cut against plaintiffs on the merits of their claims of a right to access to the preferred forum, but it does affect at least slightly the weight of the harm plaintiffs would suffer if this court erroneously denied an injunction. See *Cornelius*, 473 U.S. at 809, 105 S. Ct. at 3452-53 (noting channels available to speaker other than the preferred nonpublic forum). On the other side, if an injunction is erroneously granted, the Building Authority is likely to be harmed in the loss of control over the government property it has a duty to manage. The controversy and disruption that may be caused by the placement of private displays in the lobby of the City-County Building are not conjectural, as evidenced by last year's events. But such harm also does not appear to threaten disaster. In neither case is the injury threatened by an erroneous decision so great as to tip the scales significantly one way or the other. This is not a case where the plaintiffs are entitled to an injunction based on a slight possibility of prevailing on their claims. Because plaintiffs have not shown a reasonable likelihood of prevailing on their new claims, plaintiffs' motion for preliminary injunction is denied.

So ordered.

Appendix C

United States Court of Appeals
For the Seventh Circuit

No. 94-3730

Rabbi Abraham GROSSBAUM and Lubavitch
of Indiana, Incorporated,
Plaintiffs-Appellants,

v.

INDIANAPOLIS-MARION COUNTY BUILDING AUTHORITY
and Ronald L. Reinking, in his
Capacity as General Manager,
Defendants-Appellees.

Argued Jan. 19, 1995
Decided Aug. 15, 1995

Before RIPPLE, MANION and ROVNER, Circuit Judges.

RIPPLE, Circuit Judge.

For many years the plaintiffs, Rabbi Abraham Grossbaum and Lubavitch of Indiana, Inc., had received annual permission to display a menorah in the lobby of the City-County Building in Indianapolis during the eight days of Chanukah. In 1993, the defendant Indianapolis-Marion County Building Authority ("Building Authority") changed its policy and denied permission for the display. In 1994, following a second refusal to permit the menorah display, the plaintiffs sought injunctive and declaratory relief against the Building Authority and Ronald L. Reinking, its general manager. The district court, acting without the benefit of

the Supreme Court's recent guidance in this area, denied the plaintiffs' motion for preliminary injunction. The plaintiffs then timely appealed that decision to this court pursuant to 28 U.S.C. § 1292(a)(1). For the reasons presented in the following opinion, we reverse the judgment of the district court.

I

A. *Facts* [1]

The City-County Building in downtown Indianapolis is the seat of government for the City of Indianapolis and the County of Marion, Indiana. It is administered by the defendant Building Authority, a municipal corporation. The tenants of the building include many of the offices, agencies and departments of the City and County. The lobby of the building is open to the public during business hours. Mr. Reinking, General Manager of the Building Authority that manages the City-County Building, is responsible for granting or denying requests to use lobby space in the building.

The lobby of the City-County Building is a site where, by policy and longstanding practice, the Building Authority has allowed broad access to a wide variety of public and private speakers. Requests to use the lobby and to place displays or exhibits in the lobby are usually made in writing, addressed to the Building Authority. However, numerous oral requests have been made and granted as well. Of the 117 written requests made from 1990 through

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[1] The factual record in this case is not disputed. The parties submitted Joint Stipulations of Fact, R.9. The facts recited in this opinion derive from those stipulations and from other uncontested facts offered by the parties at the district court hearing.

September 22, 1994, all were granted, to public and private groups alike, except several requests for sales or fundraising activities, one request for third-time use by the same party, and, in 1993 and 1994, the plaintiffs' requests to display their menorah at Chanukah. [2/]

Rabbi Grossbaum, an Orthodox Jewish Rabbi, and Lubavitch of Indiana, Inc., an Orthodox Jewish Organization ("Lubavitch"), were granted permission from the Building Authority, through Mr. Reinking, to erect their five-foot wooden menorah in the lobby of the City-County Building throughout Chanukah each year from approximately 1985 through 1992. [3/] Their menorah display was accompanied by a sign stating "Lubavitch wishes you a Happy Chanukah," and plaintiffs were permitted to light the candles.

During Chanukah 1992, the Building Authority received complaints that the display of the menorah in the City-County Building violated the Establishment Clause of the Constitution. Thereafter, at its October 4, 1993 meeting, the Building Authority considered and unanimously adopted a "Policy on Seasonal Displays," which stated:

[2/] There clearly was no policy to prohibit the sale of goods in the lobby, however. Requests for use of the lobby for the sale of Girl Scout cookies and the Indianapolis Bar Association dinner tickets were approved, for example. *See, e.g.*, App. at 36, 42, 46, 54, 66, 67, 69, 158. The notations made by Mr. Reinking on the written requests for space indicated that the decision was made on the basis of availability of space.

[3/] The menorah is a nine-pronged candelabrum that is displayed during the eight days of Chanukah, and is lit each night of the festival. It is a religious symbol associated with the holiday. Joint Stipulation 10, R.9 at 3.

> Religious displays and symbols are not permitted in the City-County Building in that the display of seasonal religious symbols in the halls of government conveys the appearance of governmental endorsement of religion in violation of the Establishment Clause of the First Amendment of the Federal Constitution.

At first the Building Authority prohibited both the menorah and the Christmas tree in its lobby. However, once it was informed by counsel that courts treat a Christmas tree as a secular, rather than religious, symbol, the Building Authority Board decided in its December 1, 1993 meeting that a Christmas tree in the lobby was consistent with, rather than in violation of, its Policy. It erected a Christmas tree in the lobby, but continued to prohibit display of the menorah on the ground that its Policy on Seasonal Displays forbade religious displays and symbols in the lobby.

Lubavitch did not pursue its efforts to present its display in 1993. In 1994, however, after it again was denied permission to display its menorah on the same ground, the plaintiffs filed a complaint, seeking declaratory and injunctive relief, against the Building Authority and Mr. Reinking in his official capacity. The complaint contained four counts: two free speech claims, alleging viewpoint-based and content-based discrimination against religious speech, an equal protection claim and a free exercise of religion claim. The complaint alleged that, because Lubavitch wanted to erect a menorah during Chanukah 1994 and in future years, the Building Authority's denial of that request to display a menorah constituted a continuing injury. Lubavitch also moved for a temporary restraining order or preliminary injunction as to count I only, the religious discrimination allegation based on viewpoint discrimination.

B. *District Court Decision*

The district court denied plaintiffs' motion for a preliminary injunction on November 22, 1994. *See Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 870 F. Supp. 1450 (S.D. Ind. 1994). Its evaluation of the preliminary injunction focused on the plaintiffs' reasonable likelihood of success on the merits. The point of disagreement was clearly defined: The plaintiffs alleged that the Building Authority's Policy on Seasonal Displays, which excluded seasonal religious symbols from its lobby, amounted to viewpoint discrimination. In the Building Authority's view, religion was a subject, not a viewpoint.

Because the parties had stipulated, for the purposes of this litigation, that the lobby was a "nonpublic forum," the district court followed the analysis for evaluating access to nonpublic forums under the Free Speech Clause set forth in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). Under that approach, discrimination on the basis of subject matter was permissible, but discrimination on the basis of viewpoint was not. The district court determined that the Building Authority had not established a "subject," namely the "holiday season," as to which plaintiffs' menorah expressed a "religious viewpoint." The court was not persuaded by the plaintiffs' position that the Building Authority allowed secular symbols and viewpoints, such as the Christmas tree, on the subject of the "holiday season" but prohibited religious symbols and viewpoints, such as plaintiffs' menorah, on the same subject. Nor did the court believe that the Building Authority's Policy barring seasonal displays "for religious purposes" had been unconstitutionally applied to prohibit the plaintiffs' display. According to the court, the record did not show that the Building Authority, since it had adopted the challenged Policy, had permitted

private displays expressing "secular viewpoints" on the holiday season. The court then stated:

> With the very limited factual showing of uses of the lobby even arguably tied to "the holiday season," the Court is not persuaded the Building Authority has taken any actions that amount to recognizing "the holiday season" as a meaningful category or subject matter for speech and expression of competing "viewpoints" in this nonpublic forum. And without a relevant track record of actual "holiday" uses after the Building Authority adopted its policy in 1993, "the holiday season" is, in the abstract, too broad and too amorphous to be treated as a "subject" for purposes of this analysis.

870 F. Supp. at 1461.

In the district court's view, the viewpoint discrimination forbidden in *Lamb's Chapel* had not occurred here. Instead of suppressing a point of view, the court opined, the Building Authority had decided to avoid the controversy that might be provoked by displays of religious symbols. The court concluded that "the Building Authority decisions about access to the lobby in this record do not show 'the holiday season' to be a subject for which the Building Authority has opened the lobby for private expressions of various secular and religious viewpoints." *Id.* at 1462.

Nevertheless, the district court approved the Building Authority's display of a Christmas tree as a secular display that did not establish viewpoint discrimination under this circuit's decision in *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341 (7th Cir. 1990). In fact, the court pronounced *Lubavitch Chabad*, rather than *Lamb's Chapel*,

to be a case "on all fours factually and control[ling] in this nearly identical factual context." *Id.* *Lubavitch Chabad* upheld the decision by the City of Chicago to put a Christmas tree, a secular symbol, in the O'Hare Airport and, at the same time, to exclude private displays of religious symbols; this court held that such refusal did not amount to religious discrimination or an equal protection violation. The district court concluded: "The First Amendment does not force the Building Authority to choose each December between putting up no decorations at all, even purely secular ones, and opening up the lobby to any private group that wants to display any variety of religious symbols." 870 F. Supp. at 1463.

Although it was not necessary in light of its earlier analysis, the district court next addressed the Building Authority's Establishment Clause defense. It determined that "the record does not show that the proposed display would violate the Establishment Clause." *Id.* at 1464. The district court invoked the "equal access" or neutrality analysis of Supreme Court case law and concluded that the Building Authority did not appear to endorse the religious message of the menorah, and thus was probably not violating the Establishment Clause during the years it allowed the display of the menorah. The court also found that the Building Authority did not offer evidence that the menorah would dominate the lobby and thereby create an appearance of endorsement. It concluded that, had it been required to reach the issue of endorsement, this Establishment Clause concern would not have constituted a sufficient basis for denying a preliminary injunction.

The district court's denial of the motion for preliminary injunction concluded:

> Based on the record before the court, the Building Authority is not engaging in viewpoint discrimination when it applies its policy to refuse plaintiffs permission to display their menorah in the lobby of the City-County Building. The Free Speech Clause does not require the Building Authority to allow plaintiffs to display their menorah, nor does the Establishment Clause prohibit the Building Authority from allowing them to do so. The First Amendment leaves the Building Authority's manager and board at least that much room to exercise their judgment over appropriate uses of the public property that has been entrusted to them.

870 F. Supp. at 1465. This appeal was timely filed. [4/]

II

DISCUSSION

A. *Review of Preliminary Injunction*

When we review a district court's preliminary injunction decision, we accord substantial deference to that court's discretionary acts of weighing evidence and balancing equitable factors. However, our consideration of that court's legal conclusions is a de novo review. *Gateway E. Ry. v. Terminal R.R. Ass'n*, 35 F.3d 1134, 1137 (7th Cir. 1994) (citing *United States v. Baxter Healthcare Corp.*, 901 F.2d 1401, 1407 (7th Cir. 1990)). The party seeking a

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[4/] On November 29, 1994, this court granted plaintiffs' motion for an injunction pending resolution of this appeal. Lubavitch was therefore permitted to erect its menorah display during Chanukah 1994.

preliminary injunction has the burden of establishing four factors:

> A district court typically considers whether the moving party has demonstrated (1) some likelihood of prevailing on the merits, and (2) an inadequate remedy at law and irreparable harm if preliminary relief is denied. If the movant clears these two thresholds, the court must consider (3) the irreparable harm the nonmovant will suffer if preliminary relief is granted, balanced against the irreparable harm to the movant if relief is denied; and (4) the public interest, meaning the effect that granting or denying the injunction will have on nonparties.

Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1067 (7th Cir. 1994) (citing *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11-12 (7th Cir. 1992); *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386-88 (7th Cir. 1984)); *see Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 608 (7th Cir. 1993).

The central issue in this appeal is whether the district court erred in denying a preliminary injunction on the ground that Lubavitch was not likely to succeed on the merits of its case. Although the parties do not discuss them, the other three factors are clearly present. It seems indisputable that both the movants and nonmovants could suffer irreparable harm in this case: The plaintiffs would be injured if the denial of the menorah display was an unconstitutional violation of their freedom of expression. The defendants would be harmed if their Establishment Clause justification for denying the display was determined to be unconstitutional. Moreover, it is surely in the public interest to decide whether the Building Authority's refusal to

display the menorah is viewpoint-based discrimination, or whether the Building Authority's defense under the Establishment Clause allows the exclusion of the menorah. For this reason we turn, as did the district court, to the question whether the plaintiffs are likely to succeed on the merits of their claims. [5/]

B. *The Free Speech Claim*

Rabbi Grossbaum and Lubavitch claim that the Building Authority's adoption and application of a policy forbidding religious holiday displays and symbols excludes their menorah from the lobby of the City-County Building

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[5/] In addition to its constitutional defense, the Building Authority presents a defense of laches to bar injunctive relief. It claims Lubavitch unreasonably delayed commencing this action. According to the defendants, Lubavitch knew of the Authority's refusal to display the menorah more than a year earlier, but filed the lawsuit only twenty days prior to Chanukah, without giving reasons for the delay.

This defense is without merit. Rabbi Grossbaum wrote to Mr. Reinking on June 27, 1994, again requesting permission for the menorah display. He asked whether the Building Authority had reconsidered its Policy and asked for an explanation if the menorah would not be allowed. Because he received no response, the Rabbi wrote again on August 4, 1994. Mr. Reinking replied by letter on August 9, 1994; he explained that the Policy "does not permit the display of seasonal religious symbols in the building," and denied Rabbi Grossbaum's request. Less than three months later, on November 7, 1994, the plaintiffs filed their verified complaint in the United States District Court in the Southern District of Indiana. *See* App. at 176-78. In addition, defendants did not claim that they were harmed. Mere delay is not enough; prejudice must also be shown. *Gardner v. Panama R.R.*, 342 U.S. 29, 31, 72 S. Ct. 12, 13, 96 L. Ed. 31 (1951) (per curiam); *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 894 (7th Cir. 1990).

solely because of the religious content, nature and/or viewpoint expressed by the display. They further maintain that such a denial is an unconstitutional exclusion of speech protected by the First Amendment. [6]

Two factors relevant to our analysis are undisputed. The first is that the menorah is a privately owned religious symbol. It is well established that the display of such symbols as a menorah, a cross, or a creche is symbolic religious speech protected by the First Amendment. *Capitol Square Review & Advisory Bd. v. Pinette*, --- U.S. ----, ----, 115 S. Ct. 2440, 2446, 132 L. Ed. 2d 650 (1995) (stating that Supreme Court precedent establishes that the Ku Klux Klan's display of a cross is private religious expression that "is as fully protected under the Free Speech Clause as secular private expression"). [7] The second factor upon which the parties agree is that the lobby of the City-County building is a nonpublic forum. We therefore turn now to whether the government defendants in this case can exclude such protected speech from its nonpublic forum.

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[6] The First Amendment of the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

U.S. Const. amend. I.

[7] *See Doe v. Small*, 964 F.2d 611, 618-19 (7th Cir. 1992) (en banc) (paintings of the life of Christ are protected religious speech); *see also Chabad-Lubavitch v. Miller*, 5 F.3d 1383, 1387 (11th Cir. 1993) (listing cases); *Congregation of Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1164 (6th Cir. 1993) (citing *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 2539, 105 L. Ed. 2d 342 (1989)).

1.
The Nonpublic Forum

Constitutionally protected religious expression is not guaranteed unlimited access to government property. The Supreme Court's approach for deciding when the government's limitations on the use of its property outweigh the interest of private parties wishing to use the property for other purposes is termed "forum analysis." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 105 S. Ct. 3439, 3448, 87 L. Ed. 2d 567 (1985). "The right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses." *Capitol Square*, --- U.S. at ----, 115 S. Ct. at 2446 (citing *Cornelius*, 473 U.S. at 802-03, 105 S. Ct. at 3449). *Cornelius* has most succinctly defined and differentiated the three types of forums. The first is the "traditional public forum," which is a place that " 'by long tradition or by government fiat [has] been devoted to assembly and debate.' " 473 U.S. at 802, 105 S. Ct. at 3449 (quoting *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983)). The second, a limited or designated public forum, is one "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for discussion of certain subjects." *Id.* The third and last forum is the nonpublic one which the government "may reserve ... for its intended purposes," *Perry*, 460 U.S. at 46, 103 S. Ct. at 955, and over which it has the right to exercise control concerning access. *Cornelius*, 473 U.S. at 806, 105 S. Ct. at 3451; *see also International Soc'y for Krishna*

Consciousness, Inc. v. Lee, 505 U.S. 672, ---- - ----, 112 S. Ct. 2701, 2705-06, 120 L. Ed. 2d 541 (1992). [8/]

"[T]he extent to which the Government can control access depends on the nature of the relevant forum." *Cornelius*, 473 U.S. at 800, 105 S. Ct. at 3448. Restrictions to access of a public forum must be minimal, because the purpose of that forum is "the free exchange of ideas." For that reason "speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id.* The same test is applied to designated forums: "[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling state interest." *Id.* However, access to nonpublic forums is

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[8/] *Krishna Consciousness* discusses the same three categories:

> Under this approach, regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny. Such regulations survive only if they are narrowly drawn to achieve a compelling state interest. *Perry, supra*, 460 U.S. at 45, 103 S. Ct. at 955.... The second category of public property is the designated public forum, whether of a limited or unlimited character -- property that the state has opened for expressive activity by part or all of the public. *Ibid.* Regulation of such property is subject to the same limitations as that governing a traditional public forum. *Id.* at 46, 103 S. Ct. at 955.... Finally, there is all remaining public property. Limitations on expressive activity conducted on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view. *Ibid.*

Id. at ---- - ----, 112 S. Ct. at 2705-06.

governed by a different standard: It "can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.' " *Id.* (quoting *Perry*, 460 U.S. at 46, 103 S. Ct. at 955).

> With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, we have said that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."

Lamb's Chapel, 508 U.S. at ----, 113 S. Ct. at 2147 (quoting *Cornelius*, 473 U.S. at 806, 105 S. Ct. at 3451, citing in turn *Perry Education Ass'n*, 460 U.S. at 49, 103 S. Ct. at 957). Thus, in a nonpublic forum, the government may control access, restricting identifiable subjects or speakers, if the two criteria of reasonableness and viewpoint neutrality are met. Concerning the "reasonableness" prong, *Cornelius* has made clear that the government's "decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated." 473 U.S. at 808, 105 S. Ct. at 3452 (citing cases). In a nonpublic forum, an evaluation of the reasonableness of the restriction of access "must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Id.* at 809, 105 S. Ct. at 3452.

Concerning the "viewpoint neutrality" prong, *Cornelius* stated the rule for a nonpublic forum as well:

> [T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Id. at 806, 105 S. Ct. at 3451. Subsequent Supreme Court decisions have followed this analysis. *See Lamb's Chapel*, 508 U.S. at ----, 113 S. Ct. at 2147 (holding unconstitutional a rule excluding all religious speech as viewpoint discrimination); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390-93, 112 S. Ct. 2538, 2547-48, 120 L. Ed. 2d 305 (1992) (striking down as unconstitutional a criminal statute that amounted to viewpoint discrimination). Our circuit has also applied these principles when announcing that "no arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time." *Hedges v. Wauconda Community Unit School Dist. No. 118*, 9 F.3d 1295, 1297 (7th Cir. 1993):

> The first amendment's ban on discriminating against religious speech does not depend on whether the school is a "public forum" and, if so, what kind.... Even when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint. Especially not on account of a religious subject matter, which the free exercise clause of the first amendment singles out for protection.

Id. at 1298 (citations omitted) (holding that school policy prohibiting written material of a religious nature violates the first amendment); see *Air Line Pilots Ass'n, Int'l v. Department of Aviation*, 45 F.3d 1144, 1159 (7th Cir. 1995)

(noting that proper focus of viewpoint inquiry is one which "examines whether the proposed speech dealt with a subject that was 'otherwise permissible' in a given forum").

2.
Viewpoint Discrimination

The plaintiffs' position is that exclusion of their menorah display from the City-County Building lobby on religious grounds, when comparable secular holiday displays by other private groups are permitted, constitutes viewpoint-based discrimination in violation of the Free Speech Clause of the First Amendment. Rabbi Grossbaum and Lubavitch submit that their menorah, a religious symbolic display, constitutes protected speech on the "holiday season," an "includible subject" for discussion in the City-County Building lobby. In their view, the district court erred in refusing to recognize that the Building Authority had identified the "holiday season" as a "meaningful category or subject matter for speech." The Building Authority responds that the district court correctly portrayed its Policy, and that the plaintiffs' characterization of the Policy as a "seasonal display" or a "holiday season" policy is incorrect. By creating a policy which prohibits *all* religious displays and symbols, the Building Authority submits, it properly exerted its right to exercise control over the nonpublic forum lobby in a reasonable and viewpoint-neutral manner. In fact, it claims that its Board "neither proposed, adopted nor intended a ban on only *seasonal* religious displays." Appellees' Br. at 20.

a.

The district court upheld the Building Authority's Policy on the basis that "the holiday season" was "too broad and too amorphous to be treated as a 'subject' " on which

the plaintiffs' menorah expresses a religious viewpoint. 870 F. Supp. at 1461. We begin our review of the district court's conclusion by turning to the Policy itself. The Building Authority's "Policy on Seasonal Displays in the City-County Building" announces its subject in its title; it clearly concerns "seasonal displays" in its government building. The Policy, although perhaps not artfully written, clearly is a prohibition of one type of seasonal display, namely religious displays and symbols. The justification for that prohibition was straightforwardly presented: "[T]he display of seasonal religious symbols in the halls of government conveys the appearance of governmental endorsement of religion in violation of the Establishment Clause of the First Amendment of the Federal Constitution." We cannot accept the view that such a subject category is too broad or amorphous to serve as a "subject" for the purpose of forum analysis. The subject of the "holiday season" is a conceptually well-defined subject; indeed, the Board of the Building Authority had a meeting to discuss this very subject and had arrived at a specific, easily understood resolution. It had no difficulty recognizing the "holiday season" as a topic of discussion. In his memorandum to the Board prior to the October 4, 1993 meeting, General Manager Reinking stated that the need for a written policy arose after unwanted publicity during the 1992 "holiday season." [9/] The minutes

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[9/] Mr. Reinking's statement concerning the need for a display policy is as follows:

> The attention and publicity focused on the lobby of the City-County Building during the *holiday season* of 1992 pointed out the need for the authority to have a written policy regarding displays in our building. Last year's *holiday season* brought newspaper articles, correspondence from the Indiana Civil Liberties Union and research into constitutional law. I am hopeful that an appropriate policy can facilitate a less controversial *season* in this and future years.

of the October 4, 1993 meeting reflected a continuation of the Board's consideration of the events of "last year's holiday season" which created the need for a "policy on seasonal displays." The Board unanimously adopted the Policy. At the next meeting, on December 6, 1993, the Board, asked to interpret the Policy on Seasonal Displays, decided that a Christmas tree could be put in the lobby, consistent with the Policy as previously adopted, because it was secular in nature. [10/] *See* App. at 165-69.

The record of lobby use before the Policy was enacted, which the district court declined, wrongly in our opinion, to consider, indicates that the Building Authority in the past had allowed both religious and secular holiday displays by private and public groups. *See* App. at 40, 69, 72, 134. In fact, the notations on the written requests for use of the lobby suggest that the Building Authority's Policy was based entirely on availability of the space, and not on the content or speaker involved. After the Policy was enacted, the Board's discussion at its December 6, 1993 meeting suggested that the only change to its practice of granting use of its lobby was that seasonal religious symbols

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> Included in this mailing is a draft of a policy on seasonal displays which Howard Kahlenbeck has prepared. Howard will discuss this draft, and the pertinent issues associated with the establishment of such a policy, with the directors at the meeting on Monday, October 4, 1993.

App. at 159 (emphasis added).

[10/] There was no discussion at any of these meetings that the secular display could be placed in the lobby because it was sponsored or erected by the government rather than a private organization. The discriminating characteristic that allowed the Christmas tree display and prohibited the menorah was solely that the former was a secular symbol and the latter a religious one. The distinction was made on the basis of what was said, not who was speaking.

were not permitted. We conclude that, based on the Policy as it was written, and based on the Building Authority's practice of granting permission to use the lobby both before and after the enactment of the Policy, the Policy's prohibition can be characterized only as one based on seasonal displays in the City-County Building that express a religious perspective on the season.

b.

Realizing that *Lamb's Chapel* indicates a result opposite from the one it reached, the district court attempted to distinguish that case from the one before it. On appeal, the defendants now urge that we accept some of those distinctions. Consequently, in reaching our decision, we have examined *Lamb's Chapel* with great care. In that case, the Supreme Court acknowledged that a school district, "like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated." 508 U.S. at ---, 113 S. Ct. at 2146. It then held that, when a school district opens school facilities for use by community groups for a wide variety of social, civic, and recreational purposes, its formal policy against opening those facilities to a group seeking to show a film addressing child-rearing questions from a "Christian perspective" was viewpoint discrimination:

> That all religions and all uses for religious purposes are treated alike under [the policy in question], however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint.

Id. at ----, 113 S. Ct. at 2147. The Court focused on two of the school district's rules for regulating use of school property when not in use for school purposes. Rule 10 authorized "social, civic, or recreational uses," and Rule 7 prohibited its use "by any group for religious purposes." The Court concluded that Rule 7, forbidding any use for religious purposes, was unconstitutionally applied. The denial of the application to exhibit the film on child-rearing questions solely because the presentation was from a religious perspective was constitutionally impermissible viewpoint discrimination. *Id.* The Court then applied the teachings of *Cornelius*:

> Although a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum ... the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Id. (quoting *Cornelius*, 473 U.S. at 806, 105 S. Ct. at 3451). The Court concluded that the government was regulating speech by favoring some viewpoints over others in violation of the First Amendment. *Id.* at ---- - ----, 113 S. Ct. at 2147-48. As the Eighth Circuit noted in *Good News/Good Sports Club v. School District*, 28 F.3d 1501 (8th Cir. 1994), *cert. denied*, --- U.S. ----, 115 S. Ct. 2640, 132 L. Ed. 2d 878 (1995), *Lamb's Chapel* recognized that "a religious viewpoint can constitute a separate viewpoint on a wide variety of seemingly secular subject matter. Viewpoint is synonymous with perspective." *Id.* at 1506.

The defendants submit that the case before us is different from *Lamb's Chapel*. In *Lamb's Chapel*, Rule 10 allowed (*i.e.*, "opened the forum" to) use of the school for

social, civic, and recreational topics, and Rule 7 expressly excluded religious viewpoints. The "subject matter"--social, civic and recreational topics--was expressly stated and the exclusion of a religious viewpoint on these otherwise includible subjects was discriminatory. By contrast, in this case, defendants submit, there was no explicit delineation of which subjects were permitted. Therefore, the Policy did not regulate viewpoints on a list of permitted subjects; it simply eliminated one subject, religion, from the subjects that could be discussed in this nonpublic forum. Therefore, the Building Authority claims that it properly exerted its right to exercise its control over the nonpublic forum lobby in a reasonable and viewpoint-neutral manner: Its Policy prohibits *all* religious displays and symbols. It further suggests that there is no evidence that it would allow, under private sponsorship, secular seasonal holiday displays.

We cannot accept these attempts to distinguish the clear teaching of *Lamb's Chapel*. As the court's colloquy with counsel at oral argument made quite clear, the Policy challenged here was constructed to prevent one thing: seasonal holiday displays of a religious character. The absence of an explicit list of permissible subjects upon which discourse is permissible in this nonpublic forum does not mean that there is no "otherwise includible subject" for discussion in the forum. In *Hedges*, 9 F.3d at 1296-97, for example, the school board announced two policies prohibiting the distribution of "written material that is of a religious nature" and "written material ... which expresses religious beliefs or points of view." This court recognized that the policies impliedly allowed the distribution of all other written material, and concluded that the prohibition of religious speech was unconstitutional. *See also Good News/Good Sports Club*, 28 F.3d at 1506-07 (holding that a policy generally encouraging the moral character and development of youth by permitting on school premises the

Boy Scouts and Girl Scouts, but not permitting a religious youth organization, violates the First Amendment's prohibition of viewpoint discrimination); *Searcey v. Crim*, 815 F.2d 1389 (11th Cir. 1987) (holding that the exclusion of "peace activists" from "career days" when military recruiters were permitted access was viewpoint-based administration); *cf. AIDS Action Comm. of Mass., Inc. v. Massachusetts Bay Transp. Auth.*, 42 F.3d 1, 11-12 (1st Cir. 1994) (finding viewpoint discrimination in application of transit authority policy that prohibited the display of AIDS advertisements but allowed the display of sexually explicit movie advertisements).

Any lingering doubts about whether the religious displays prohibited by the Policy are properly characterized as "viewpoint" rather than "subject matter" have been dispelled by the Supreme Court's recent pronouncement in *Rosenberger v. Rector & Visitors of the University of Virginia*, --- U.S. ----, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). In *Rosenberger*, the University of Virginia, a state entity, denied authorization for paying the printing costs of the petitioners, a student publication, solely because their paper "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." *Id.* at ----, 115 S. Ct. at 2513. The Court treated the Student Activities Fund ("SAF"), from which payment for student groups is made, as a limited forum, even if "more in a metaphysical than in a spatial or geographic sense," *id.* at ----, 115 S. Ct. at 2517, and treated it as a limited public forum that can be preserved for certain uses, as were the school facilities in *Lamb's Chapel*.

Relying on *Lamb's Chapel*, *Cornelius*, and *Perry* as apposite precedents, the Court elaborated on the parameters

within which the government may regulate speech [11] and explained that the "necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." *Id.* at ---- - ----, 115 S. Ct. at 2516-17. Nevertheless, "[o]nce it has opened a limited forum, ... the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint." *Id.* at ----, 115 S. Ct. at 2517 (citations omitted). The Court's method for weighing the constitutionality of the State's actions, therefore, is to decide the legitimacy of the State's reasons for discriminating:

> Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be

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[11] The Court explained:

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional.... When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Id. at ----, 115 S.Ct. at 2516 (citations omitted).

> permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Id.

In *Rosenberger*, as in our case, the government entity claimed that the exclusion of religious material was based on content, not viewpoint. The Court recognized that the distinction between content and viewpoint "is not a precise one," and that the treatment of religious thought as a viewpoint rather than a "comprehensive body of thought" is "something of an understatement" when such issues "have been subjects of philosophic inquiry throughout human history." *Id.* And yet, within this context, it is a viewpoint.

> We conclude, nonetheless, that here, as in *Lamb's Chapel*, viewpoint discrimination is the proper way to interpret the University's objections to [the excluded organization]. By the very terms of [its] prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.

Id. at ---- - ----, 115 S. Ct. at 2517-18. The Court concluded that the University's denial of the request for

payments was based upon viewpoint discrimination like that found in *Lamb's Chapel*. In *Rosenberger*, as in *Lamb's Chapel*, the excluded group would have been qualified as an organization had it not had an underlying religious outlook. In both cases, the government's justification for denying the group's message was based solely on the avowedly religious perspective of the organization's publication. The Court held "that the regulation invoked to deny SAF support, both in its terms and in its application to these petitioners, is a denial of their right of free speech guaranteed by the First Amendment." *Id.* at ----, 115 S. Ct. at 2520.

In the case before us, the excluded group, Lubavitch, seeking to display the menorah, had already been qualified as a permissible organization to use the lobby for years. Others with non-religious messages remain free to apply for space in the City-County Building. The Board's justification for denying the menorah display in its Policy was expressly that it was religious. In this case, therefore, consistent with the Supreme Court in *Rosenberger* and *Lamb's Chapel*, we hold that the prohibition of the menorah's message because of its religious perspective was unconstitutional under the First Amendment's Free Speech Clause. [12/]

[12/] The district court and the Building Authority rely on *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341 (7th Cir. 1990), as relevant authority. This reliance is misplaced; the legal claims relating to the religious displays and the policies at issue in *Chabad House* and in this case are not similar. In *Chabad House*, the airport displayed non-religious decorations and prevented all private displays at O'Hare, including religious displays of the type at issue in this case. The court held that this situation did not constitute discrimination against religion. The City could use its own property to send a non-religious holiday message without opening its property to messages by others. In this case, by contrast, the Policy selectively allows private access for secular holiday displays, while excluding access for all private holiday displays expressing a religious

C. *The Establishment Clause Defense*

The Building Authority submits that its exclusion of the plaintiffs also is justified because a display of seasonal religious symbols in the seat of government conveys the appearance of governmental endorsement of religion in violation of the Establishment Clause. The district court determined that the plaintiffs were not entitled to a preliminary injunction because they had no right to express their religious views in the lobby of the City-County Building. Therefore, it was unnecessary for the court to decide whether a potential Establishment Clause violation excused the defendant officials from permitting the expression. Nevertheless, the court did address this argument and determined that, assuming that the issue had to be addressed, there was, on the record before it, no countervailing Establishment Clause concern sufficiently strong to require the curtailment of otherwise permissible expression.

The court noted that the same menorah had been placed in the lobby from 1985 to 1992. In its view, there was "little danger that reasonable onlookers would think that the menorah was being displayed with the government's endorsement of any religious message." 870 F. Supp. at 1464. Noting that neutrality and equal access to the lobby would avoid Establishment Clause problems, the court concluded that the defendants' Establishment Clause defense was insufficient because the defendants had failed to demonstrate how the menorah display would suggest endorsement:

> The Building Authority has not presented evidence that would support a finding that plaintiffs' display

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viewpoint.

> would so dominate the lobby that a formal policy of equal access and neutrality would be likely to "degenerate into endorsement."

870 F. Supp. at 1465. Because we have held that the district court erred in its freedom of expression analysis, we must address whether Establishment Clause concerns require that the government exclude the plaintiffs from the nonpublic forum that the defendants have established. For the reasons that follow, we agree with the district court that, on this record, the Establishment Clause provides no justification for excluding the plaintiffs from the non-forum that they have established.

1.

At the outset, we note that the Supreme Court has made clear that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *See Capitol Square Review & Advisory Bd. v. Pinette*, --- U.S. at ----, ----, 115 S. Ct. 2440, 2446 (1995). "[T]he interest of the State in avoiding an Establishment clause violation 'may be [a] compelling' one justifying an abridgment of free speech otherwise protected by the First Amendment." *Lamb's Chapel*, 508 U.S. at ----, 113 S. Ct. at 2148 (quoting *Widmar v. Vincent*, 454 U.S. 263, 271, 102 S. Ct. 269, 275, 70 L. Ed. 2d 440 (1981)).

Despite this potential limitation on access to a forum established by the government, we believe that the district court correctly applied--and anticipated--the Supreme Court's approach in this most delicate of areas. The Supreme Court's recent cases make it clear that a governmental position of neutrality of access and evenhanded treatment of speakers is a significant factor in assessing a concern that the

presence of religious expression in the government-created forum amounts to a violation of the Establishment Clause:

> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.... More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.

Rosenberger, --- U.S. at ----, 115 S. Ct. at 2522 (citations omitted); *see also Capitol Square Review*, --- U.S. at ----, 115 S. Ct. at 2447; *Lamb's Chapel*, 508 U.S. at ----, 113 S. Ct. at 2148; *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226, 235, 110 S. Ct. 2356, 2364, 110 L. Ed. 2d 191 (1990); *Widmar*, 454 U.S. at 274-75, 102 S. Ct. at 277. This court also has regularly noted that maintaining a neutral policy avoids establishment of religion difficulties. *See Hedges*, 9 F.3d at 1299 (finding no neutrality in school district's suppression of private speech); *Sherman v. Community Consol. Sch. Dist. 21*, 8 F.3d 1160, 1165 (7th Cir. 1993) (finding evenhanded treatment of religious and nonreligious youth groups), *cert. denied*, --- U.S. ----, 114 S. Ct. 2109, 128 L. Ed. 2d 669 (1994); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 124 (7th Cir. 1987) (stating principle that government should not favor one religion over another religion or over non-religion); *see also Good News/Good Sports Club*, 28 F.3d at 1510 (holding that school policy did not advance religion, but established a neutral forum for community and student groups to engage in exchange of ideas).

In *Rosenberger*, the Supreme Court, through the pen of Justice Kennedy, set forth the approach that ought to govern the adjudication of lower courts in striking the appropriate balance between freedom of expression and the concerns protected by the Establishment Clause:

> If there is to be an assurance that the Establishment Clause retains its force in guarding against those governmental actions it was intended to prohibit, we must in each case inquire first into the purpose and object of the governmental action in question and then into the practical details of the program's operation.

--- U.S. at ----, 115 S. Ct. at 2521. Following this approach, the Supreme Court concluded that the restriction on free expression that resulted from the University's exclusion of religiously oriented publications from its activities fee was not excused by its concern that it must comply with the strictures of the Establishment Clause. The Court first determined that the University's program, the student activities fee, was neutral toward religion. [13/] The Court noted that, if there was a benefit to religion, it was "incidental to the government's provision of secular services for secular purposes on a religion-neutral basis." *Id.* at ----, 115 S. Ct. at 2524. The Court also explained that a university's scrutiny of student speech to ensure that its publications "meet some baseline standard of secular

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[13/] The *Rosenberger* Court stated:

> It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups which use meeting rooms for sectarian activities, accompanied by some devotional exercises.

Id. at ----, 115 S.Ct. at 2523.

orthodoxy" raised "the specter of governmental censorship" and would "imperil the very sources of free speech and expression." *Id.* It then concluded:

> To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint. The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action. The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was the denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.

Id. at ----, 115 S. Ct. at 2524-25.

The Supreme Court's recent decision, *Capitol Square Review*, also followed the approach of *Rosenberger*. In addition to emphasizing the general principle that the opening of government property for religious speech does not confer any imprimatur of state approval on religious sects or practices, --- U.S. at ----, 115 S. Ct. at 2447 (citing *Widmar*, 454 U.S. at 274, 102 S. Ct. at 276), the Court inquired "first into the purpose and object of the governmental action in question and then into the practical details of the program's operation." *Rosenberger*, --- U.S.

at ----, 115 S. Ct. at 2521. In *Capitol Square*, [14] the Board had rejected the display of the Ku Klux Klan's cross on its public square precisely because its content was religious; its proffered reason for denying the Klan's request was that the State had an interest in avoiding official endorsement of Christianity under the Establishment Clause. The Supreme Court agreed that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Capitol Square*, --- U.S. at ----, 115 S. Ct. at 2446 (citing *Lamb's Chapel* and *Widmar*). Nevertheless, following *Lamb's Chapel* and *Widmar*, it rejected the Establishment Clause defense. "The state did not sponsor the respondent's expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups." --- U.S. at ----, 115 S. Ct. at 2453.

2.

Following the methodology outlined by the Supreme Court in *Rosenberger* and applied by the Court in that case and in *Capitol Square*, we turn now to this case. At the outset, it is very apparent that, in many significant ways, we have before us a case very similar to those just adjudicated by the Supreme Court. Notably, we are confronted, as were the Justices, with a case in which the governmental authorities have chosen to open governmental property to some forms of private expression. As we have noted earlier in this opinion, it is clear that the holiday season is a subject

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[14] *Capitol Square* involved a "full-fledged public forum" rather than a limited forum case. However, as the Court pointed out in *Capitol Square* by its reference to *Lamb's Chapel*, the same principle applies in nonpublic forum cases.

to which the City-County Building has been opened for non-governmental, private discourse. The record also establishes, as the district court noted in its opinion, that, prior to the restrictions at issue in this case, the same menorah had been placed in the lobby by the plaintiffs for a significant number of years. At oral argument, the Building Authority made no claim that an application for space by the plaintiffs or any other religious group would receive any different treatment or be subject to any other procedure than the one used to process the applications of other groups.

As in *Capitol Square*, this case involves religious expression at or near the seat of government. In the view of the Building Authority, the placement of a menorah in the actual seat of government signals government endorsement of a religious symbol, and not even the posting of disclaimer signs on the display would be enough to mitigate the appearance of government endorsement there. The recent Supreme Court cases fail to give us definitive guidance on the appropriate assessment of the "seat of government" consideration. In *Capitol Square*, a plurality of four of the Justices would have rejected the argument that private religious expression at the seat of government can be characterized as constituting a governmental endorsement of religion when the government has opened the forum to private speakers on equal terms. Three other Justices did not believe that such a definitive exception was necessary, but believed that, given the totality of circumstances in the case, no reasonable person could consider the display in question as an endorsement of a religious point of view by the state. Among the factors which ought to be considered, they pointed out, was an awareness that the forum is open to all as a place in which expressive conduct may take place. As Justice O'Connor wrote, "the endorsement test depends on a sensitivity to the unique circumstances and context of a

particular challenged practice." --- U.S. at ----, 115 S. Ct. at 2456 (O'Connor, J., concurring).

We were confronted with a religious display at the seat of government in *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987). We concluded that the nativity scene at issue "communicate[d] a message of government endorsement," *id.* at 128, despite disclaimer signs. Unlike the situation before us today, or the situation before the Justices in *Capitol Square*, the nativity scene in City of Chicago was not placed in a forum open to discourse by other private groups. There was, prior to the placement of disclaimers after earlier litigation, a history of official endorsement. Moreover, the centrality of the location of the nativity scene did not lend itself to the interpretation that it was the expression of one speaker in a forum open to all. Indeed, the Mayor of Chicago had ordered that the nativity scene be replaced in the lobby of City Hall following public reaction to his earlier order to dismantle the display. In short, it was a self-contained religious symbol, the only religious display in City Hall, and separate from the many secular holiday decorations in and around the building. In contrast, most religious display cases to consider the proximity of the seat of government as a factor in its Establishment Clause analysis have been public forum cases. In general terms, these cases hold that, despite the close proximity of religious symbols to the seat of government, authorities constitutionally may permit private religious speech equal access to the property on equal terms with other private speakers. [15/] As we have already noted,

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[15/] *See, e.g., Chabad-Lubavitch v. Miller*, 5 F.3d 1383 (11th Cir.1993) (en banc) (reversing to permit Chabad-Lubavitch to erect a menorah in Rotunda, a public forum); *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir.1992) (en banc) (holding there was no Establishment

when evaluating the viability of an Establishment Clause defense, *Lamb's Chapel* suggests that an evenhanded, neutral right of access is just as important in evaluating nonpublic or limited forums as it is in evaluating public forums. [16]

On the basis of the record before us on this denial of a preliminary injunction, we cannot say that the district court erred when it concluded that the placement of the menorah in the lobby of the City-County building of Indianapolis, pursuant to an evenhanded policy of allowing expression on the holiday season, raises no Establishment Clause concerns

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Clause violation in displaying a privately funded menorah during Chanukah in the public plaza on which city hall and county building are located). *But see Chabad-Lubavitch v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991) (per curiam) (holding that display of unattended menorah in City Hall Park, quite close to seat of government, violated Establishment Clause because its combination alongside a secular holiday display did not cause a viewer to see the exhibit "as a whole" or as a unitary symbol), *cert. denied*, --- U.S. -----, 112 S. Ct. 3026, 120 L. Ed. 2d 897 (1992); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1030 (2d Cir.1989) (holding that display of solitary semi-permanent menorah in City Hall Park, closely associated with seat of city government, violates the Establishment Clause), *cert. denied*, 496 U.S. 926, 110 S. Ct. 2619, 110 L. Ed. 2d 640 (1990).

[16] *Cf. County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (holding that the display of a privately sponsored creche on the staircase of the courthouse violated the Establishment Clause because the display actually favored sectarian religious expression). In *Allegheny*, the Court evaluated the effect of the government conduct and determined that "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their religious choices." 492 U.S. at 597, 109 S. Ct. at 3103.

of such countervailing importance as to outweigh the plaintiffs' right to free expression.

Conclusion

Because we believe that the district court erred by not acknowledging the right of the plaintiffs to exercise their rights of free expression in the nonpublic forum created by the Building Authority on the same terms as all other persons, regardless of the religious or non-religious nature of their message, we must reverse the judgment of the district court.

REVERSED.

Appendix D

SUPREME COURT OF THE UNITED STATES
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February 6, 1997

Mr. Nathan Lewin
Miller, Cassidy, Larroca Lewin
2555 M Street, N.W.
Washington, DC 20037

Re: Abraham Grossbaum, et al.
v. Indianapolis-Marion County
Building Authority, et al.
Application No. A-562

Dear Mr. Lewin:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on February 6, 1997, extended the time to and including March 18, 1997.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By
/s/
Ruth Jones
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

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NOTIFICATION LIST

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